Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VIRGINIE GSCHWIND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY and PRATT & WHITNEY CANADA INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a court have alienage diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(2) where a foreign plaintiff has commenced an action against a citizen of a state and a citizen of a foreign state and, if there is no subject matter jurisdiction, may the court reach the merits of *forum non conveniens?*

2. May a court render a judgment of dismissal for *forum non conveniens* where it lacks subject matter jurisdiction, where the moving party has presented a "bare minimum of evidence" necessary for the court to determine whether an alternative forum exists and to balance the private and public interest factors required by *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), *Koster v. Lumbermans Mutual Casualty Co.,* 330 U.S. 518 (1947) and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), and where the opposing party has come forward with uncontroverted evidence showing that the liability-producing conduct at issue and virtually all sources of proof relating to liability are in the forum?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Tenth Circuit: Virginie Gschwind (Appellant) and The Cessna Aircraft Company and Pratt & Whitney Canada Inc. (Appellees).

The Cessna Aircraft Company is a subsidiary of Textron Inc. while Pratt & Whitney Canada is a subsidiary of United Technologies Corporation.

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IN THE

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OCTOBER TERM, 1998

VIRGINIE GSCHWIND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY, and PRATT & WHITNEY CANADA INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Virginie Gschwind respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The final order of the court of appeals on petition for rehearing (App. 1a) is not reported. The decision of the court of appeals affirming the district court (App. 3a-15a) is reported at 161 F.3d 602 (10th Cir. 1998). The memorandum and order of the district court (App. 16a-39a) is not reported. The magistrate judge's report and recommendations (App. 40a-49a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1998. The court of appeals denied a petition for rehearing and suggestion for rehearing *en banc on* November 10, 1998. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case, 28 U.S.C. § 1332(a)(2), appears in the appendix to this petition. (App. 58a).

STATEMENT OF THE CASE

Cyril Gschwind was killed when a Cessna Caravan 208B aircraft he was piloting crashed on August 16, 1993 near Cannes, France. The aircraft was brand new, having only some fifty flight hours, consisting of factory flight testing and ferry time to Europe for resale to a prospective customer. (Aplt. App. 16). No maintenance was performed outside the United States. (Aplt. App. 16, 178, 195).

The aircraft was manufactured in Kansas by The Cessna Aircraft Company ("Cessna"). (Aplt. App. 16, 51). The propellers were manufactured in Ohio by Cessna's McCauley Accessory Division. (Aplt. App. 51). The aircraft engine was manufactured in Quebec by Pratt & Whitney Canada Inc. ("Pratt & Whitney Canada"). The liaison engineering necessary to combine the engine and propeller took place in Kansas and Ohio. (Aplt. App. 51, 178).

The aircraft bore an aircraft registration number issued by the Federal Aviation Administration in this country. (Aplt. App. 8, 9, 11, 12). The registered owner of the aircraft was a Missouri corporation. (Aplt. App. 181). An Indiana bank held a security interest in the airplane. (Aplt. App. 185, 202).

The accident was investigated by French authorities, who were assisted by representatives of Cessna and its McCauley Accessory Division. (Aplt. App. 46, 180, 197). The French government sent components from the aircraft to the United States for examination and testing in Ohio. (Aplt. App. 46).

Mr. Gschwind was a French national who lived in Belgium with his pregnant wife, a Belgian citizen, and their small daughter. (Aplt. App. 31). His widow commenced a wrongful death action in the Court of Common Pleas of Montgomery County, Ohio on August 11, 1995. (Aplt. App. 13-21). Named as defendants were Cessna, a Kansas corporation with its principal place of business in Kansas, Pratt & Whitney Canada, a Canadian corporation with its principal place of business in Canada, and Hartzell Propeller Inc., an Ohio corporation with its principal place of business in Ohio, one of two propeller manufacturers (along with McCauley) which make propellers for the Caravan. (Aplt. App. 15).

The defendants removed to the United States District Court for the Southern District of Ohio, asserting subject matter jurisdiction pursuant to 28 U.S.C. § 1332, although they did not specify what subsection of the diversity statute was being invoked. (Aplt. App. 1-5). In their removal petition, the defendants alleged that, while Hartzell was an Ohio defendant such that the action would not normally be removable pursuant to 28 U.S.C. § 1441(b), in reality the propeller was not manufactured by Hartzell but was manufactured by McCauley, an unincorporated division of Cessna, a Kansas corporation. (Aplt. App. 3).[1] Gschwind moved to remand for lack of subject matter jurisdiction, a motion which was first granted, then ultimately denied after a motion for reconsideration was filed by the defendants.

Cessna filed a motion to dismiss on the grounds of *forum non conveniens* or, in the alternative, for a change of venue to the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1404(a). (App. 50a-52a). The reasons advanced by Cessna for *forum non conveniens* dismissal were the following:

---

[1]Unlike most propeller-driven aircraft, which are certified with only one kind of propeller, the Cessna Caravan is certified with either a McCauley propeller or a Hartzell propeller. (Aplt. App. 51). The French authorities originally sent the failed propeller to Hartzell in the United States for investigation and testing after the accident; hence, Hartzell's inclusion as a defendant. (Aplt. App. 51). Hartzell was subsequently dismissed by stipulation of the parties.

> "This accident involves a Cessna 208B which crashed in France."
>
> "The decedent was a French national living in Belgium with his wife, the estate's administratrix, who also is a resident of Belgium."
>
> "The facts related to the aircraft accident and its subsequent investigation are substantially located in France."
>
> "The decedent has sufficient recourse through either the French or Belgian courts for this matter."

(App. 51a). Cessna supplied no affidavits or exhibits with its motion. (App. 50a-52a). Cessna did not allege that it would be vexatious or oppressive for it to litigate the case in Ohio. (App. 50a-52a). It did not even allege that the Southern District of Ohio was an inconvenient forum. (App. 50a-52a).

Pratt & Whitney Canada filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to dismiss under the doctrine of *forum non conveniens.* The motion asked, as alternative relief, that the court "dismiss the case under the doctrine of *forum non conveniens*," without further elaboration. (App. 53a-54a). Pratt & Whitney Canada furnished no affidavits or supporting evidence on *forum non conveniens.* (App. 53a-54a).

In opposition to both motions, Gschwind submitted opposing affidavits and other documentary evidence. (Aplt. App. 48-58, 70-191, 192-213, 214-289). Two affidavits were from her experts, and discussed aspects of aircraft design, certification, and manufacturing, detailed the process by which the propeller is married to the engine, and identified critical certification, design, testing, and manufacturing documents relating to the design and manufacture of the aircraft components necessary to accident reconstruction and failure analysis. The affidavits stated that these critical documents were located and maintained in the United States by a number of sources. (Aplt. App. 48-58, 82-86, 89-102).

Gschwind also submitted affidavits from the plaintiff and her counsel, as well as an affidavit from a non-party witness

regarding his intention to testify and stating it would be more convenient for him to do so in the United States. (Aplt. App. 177-190, 194-208, 209-212, 213).

The affidavits from Mrs. Gschwind and her counsel discussed Mr. Gschwind's business dealings and flight training, and detailed the extent of his contacts in the United States, including the fact that much of his business dealings were in this country, that he regularly traveled to Kansas and elsewhere in the United States in his capacity as an authorized distributor of the Caravan for Cessna and on other business matters, and that much of his flight training, particularly in the Caravan, was in the United States. The affidavits also discussed potential witnesses from whom Gschwind needed to elicit testimony located in the United States, some of whom were government witnesses whose testimony could only be taken by deposition. Gschwind also identified witnesses outside the United States (and not just in France) with knowledge relevant to the issues of liability and damages, who had been contacted and were willing to come to this country to testify. (Aplt. App. 177-186, 194-204, 209-212, 213).

Cessna submitted no affidavits in reply, although it filed reply and surreply briefs. The only supporting "documentary evidence" Cessna was able to muster in reply consisted of a four page excerpt of the Hague Evidence Convention, a two page excerpt of a lawsuit, in French, and a note supposedly faxed by the decedent to a colleague in Denmark the night before the accident. (App. 55a-56a, 57a).

On July 3, 1996, Michael R. Merz, a U.S. Magistrate Judge in the Southern District of Ohio, issued a report recommending that the case not be dismissed for *forum non conveniens*. (App. 40a-49a). The magistrate judge found that the defendants had not satisfied the first prong of *Gulf Oil Co. v. Gilbert*, 454 U.S. 235 (1981), and had failed to prove there was an adequate alternative forum, but nevertheless proceeded to weigh the *Gilbert* private and public interest factors. (App. 42a). The magistrate judge found that neither Cessna nor Pratt & Whitney Canada had established that the balance of convenience favored a French or Belgian forum and recommended that their motions to dismiss be denied. (App. 44a).

Cessna's alternative request to transfer the case to the District of Kansas was granted because the magistrate judge found "far more sources of proof, both live and documentary, [were] in Kansas." (App. 44a). The action was then transferred to the District of Kansas pursuant to 28 U.S.C. § 1404(a). (App. 46a).

Some eight months later, Judge Monti Belot of the District of Kansas granted the *forum non conveniens* motions. (App. 16a-39a). Looking to *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), the district court began its analysis by stating that a party moving to dismiss on *forum non conveniens* grounds need not

> submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary. [Defendants] have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. . . .Rather, defendants need only provide sufficient information to enable the court to balance the parties' interests.

(App. 24a-25a) (quoting *Reyno,* 454 U.S. at 258).

Finding France to be an available alternative forum because the defendants agreed to be amenable to suit in France and finding French law would apply, (App. 26a, 26a-30a), the district court proceeded to balance the private and public interest factors under *Gilbert.* The court determined that relative ease of access to sources of proof and the ability to compel the attendance of unwilling witnesses favored France, even though "virtually all evidence relevant to [Gschwind's] cause of action is in North America." (App. 23a).

The district court made sweeping factual conclusions to the effect that most of the decedent's records and business associates were in Europe, without reference to the contrary evidence submitted by Gschwind, and that accident investigation personnel, aviation authorities, and air traffic controllers were in France and were critical to defendants' ability to

prove their affirmative defenses, when there was no evidence in the record supporting these findings. (App. 31a).

The district court observed that there are no depositions in civil proceedings in France nor may counsel conduct direct or cross-examination of witnesses, who are not questioned under oath. (App. 34a). However, the district court recognized that France has authorized deposition testimony under oath for purposes of foreign proceedings upon a "letter of request" under the Hague Evidence Convention. (App. 34a).

The district court thus concluded that, "if the case is tried here, defendants will be able to obtain deposition testimony of French witnesses under substantially the same conditions as if the depositions were conducted in the United States." (App. 34a). Still, the trial court found live testimony on the defense claims of contributory negligence and/or suicide to override Gschwind's need to prove defendants' liability for damages, even though Gschwind is afforded no comparable means of preserving the testimony of unwilling foreign witnesses if the action proceeds in France. (App. 34a-35a).

Having also concluded that public interest factors clearly favored a French forum, the district court held that "litigation in this court would pose a heavy burden on defendants and on this court. Gschwind has offered no satisfactory reason for bringing this litigation in her chosen forum, Ohio, or for continuing her litigation here." (App. 37a). The *forum non conveniens* dismissal was conditioned upon defendants' agreement to try to produce employees in France and to waive any limitations defenses. (App. 38a).

The *forum non conveniens* dismissal was affirmed by the United States Court of Appeals for the Tenth Circuit, which agreed that France presented an adequate alternative forum. (App. 7a-10a).

As far as the district court's balancing of private interest factors, the court of appeals did not address the ability of the defendants to preserve testimony of unavailable witnesses in France if the action proceeded in the United States and the corresponding inability of Gschwind to preserve witness testimony in the United States if the action proceeded in France

in its opinion, although this critical question was discussed at length during oral argument. (App. 3a-15a). The court of appeals concluded that the district court's findings that evidence relevant to the defendants' claim that Mr. Gschwind's actions in operating the aircraft caused the crash was more readily available in France was not clearly erroneous, without reference to the contrary record created by Gschwind, including the fact that the defendants participated in the official accident investigation and already were privy to any such information. (App. 11a).

The court of appeals also acknowledged that "a forum resident should have to make a stronger case than others for dismissal based on *forum non conveniens*." (App. 12a) (citing *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991). The court of appeals nevertheless found the strength of this factor to be "diluted by at least one-half" since Pratt & Whitney Canada was not a resident of the forum and "further diluted" by the fact that the resident defendant was a corporation. (App. 12a). The court of appeals concluded the district court did not err in failing to consider Cessna's convenience in litigating in its own backyard or in "failing to make a stronger case than others for dismissal." (App. 12a).

Having likewise found the district court's balancing of public interest factors to not be clearly erroneous, the court of appeals then turned to Gschwind's challenge to the factual showing made by defendants as insufficient to support a finding that the public and private interest factors weighed in favor of dismissal:

> [D]efendants have come forward with documentary evidence in support of their theory that the decedent had been having business difficulties shortly before his death and that he may have taken his own life. See Appellant's App. at 293-95. Defendants also provided the district court with a copy of pertinent articles of the Hague Evidence Convention, which shed light on the ability of the United States to compel attendance of unwilling foreign witnesses. Admittedly, Defendants have presented a bare minimum of evidence necessary for the court to conduct

> an informed balancing of factors. This court certainly would have benefited from additional evidence in the record. Nevertheless, in the context of this case, the items offered by defendant gave the court enough information to conduct the balancing, and we find no abuse of discretion.

(App. 14a).

Gschwind moved for panel rehearing to set aside the judgment on the ground that the court lacked subject matter jurisdiction given that the plaintiff and one of the defendants "were citizens or subjects of a foreign state" so there was no alienage jurisdiction under 28 U.S.C. § 1332(a)(2) and no other independent basis of subject matter jurisdiction. Gschwind asked for rehearing *en banc* because the panel's opinion conflicted with Tenth Circuit precedent, specifically *Rivendell Forest Products, Ltd. v. Canadian Pacific, Ltd.*, 2 F.3d 990, 993 (10th Cir. 1993), which holds that, under *Piper Aircraft Co. v. Reyno,* a district court's *forum non conveniens* determination must be supported by "evidence in the record" and that the arguments of counsel in briefs are not evidence.

Rehearing and rehearing *en banc* were denied on November 10, 1998. (App. 1a). A motion to publish the opinion was granted on that same date. (App. 2a).

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has held that a defendant moving to dismiss for *forum non conveniens* may prevail on a "bare minimum of evidence" and need not make a clear showing that litigating in the forum would be vexatious or oppressive out of all proportion to the plaintiff's convenience, or that considerations affecting the court's administration are implicated. For all intents and purposes under this new standard, a defendant need only move to dismiss to obtain relief, without regard to supplying a factual record of any significance to support any claimed inconvenience, to allow determination of the availability of an alternative forum, or to allow reasoned and informed balancing of competing interests.

This holding both relaxes the burden of proof imposed upon a party moving to dismiss for *forum non conveniens,* and

shifts that burden to the plaintiff, contrary to *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), *Koster v. Lumberman's Mutual Casualty Co.,* 330 U.S. 518 (1947), and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981). The Tenth Circuit's decision is also contrary to decisions of other circuits regarding the sufficiency of the factual showing required to be made, as well as the Tenth Circuit's own precedent, in determining whether the alternative forum proposed is adequate, as well as in the conduct of the balancing required by *Gilbert, Koster,* and *Reyno.*

The decision below not only has far-reaching implications in *forum non conveniens* jurisprudence, but is a judgment reached without jurisdiction. Congress did not grant the federal courts jurisdiction to entertain cases and controversies between aliens. It was incumbent upon the Tenth Circuit to ensure that subject matter jurisdiction existed before it rendered judgment and before it agreed to publish its opinion.

This case raises important questions of jurisdiction and the power of federal courts to decline jurisdiction, if it exists.

ARGUMENT

I. THE COURT OF APPEALS HAS RENDERED A JUDGMENT WITH FAR-REACHING IMPLICATIONS IN A CAUSE IN WHICH IT LACKED SUBJECT MATTER JURISDICTION, IN CONFLICT WITH DECISIONS OF THE COURT AND OTHER CIRCUITS.

"[T]he first and fundamental question is that of jurisdiction, first of this [C]ourt, and then of the court from which the record comes." *Mansfield C. & L. M. Ry. Co. v. Swan,* 111 U.S. 379, 382 (1884). The answer to that fundamental question in this case is there is no subject matter jurisdiction in this action by a citizen of a foreign state against a citizen of a state and a citizen of a foreign state.

The defendants removed this action, alleging jurisdiction "pursuant to 28 U.S.C. § 1332." (Aplt. App. 3a). Section 1332 vests diversity jurisdiction in the following situations only:

1. in suits between "citizens of different States" (28 U.S.C. § 1332(a)(1)); *or*

2. in suits between "citizens of a State and citizens or subjects of a foreign state" (28 U.S.C. § 1332 (a)(2)); *or*

3. in suits between "citizens of different states and in which citizens or subjects of a foreign state are additional parties" (28 U.S.C. § 1332(a)(3)); *or*

4. in suits between a "foreign state, defined in [28 U.S.C. § 1602(a)], as plaintiff and a citizen of a State or of different States" (28 U.S.C. § 1332(a)(4)).

Since no "citizen[ ] of a State" is a plaintiff, neither 28 U.S.C. § 1332(a)(1) nor 28 U.S.C. § 1332(a)(3) affords jurisdiction. The plaintiff in this action was not a foreign state as defined by 28 U.S.C. § 1602(a), so 28 U.S.C. § 1332(a)(4) is not a basis for jurisdiction either.

The only possible basis of diversity jurisdiction is 28 U.S.C. § 1332(a)(2), affording jurisdiction in cases between "citizens of a State and citizens or subjects of a foreign state." However, alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2) may not be invoked in a suit such as this one because the presence of an alien on both sides of the action destroys complete diversity. "Diversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants." *Mutuelles Unies v. Kroll & Linstrom,* 957 F.2d 707, 711 (9th Cir. 1992) (quoting *Cheng v. Boeing Co.,* 708 F.2d 1406, 1412 (9th Cir.), *cert. denied,* 464 U.S. 1017 (1983)).

The Court has not had occasion to specifically address the parameters of 28 U.S.C. § 1332(a)(2). It has long recognized, however, that the federal courts have no diversity jurisdiction over suits between aliens, although there may be other jurisdictional bases. *E.g., Montalet v. Murray,* 4 Cranch (8 U.S.) 46, 47 (1807); *Mossman v. Higginson,* 4 Dall. (4 U.S.) 12, 13 (1800). The Court likewise has described 28 U.S.C. § 1332(a)(2) as "diversity jurisdiction. . .arising from the alienage of *one* of the parties." *Kramer v. Caribbean Mills, Inc.,* 394 U.S. 823, 829 (1969) (emphasis supplied).

The fact that Gschwind is a citizen of a foreign state and Cessna is a citizen of a state does not vest jurisdiction. The Second, Fifth, Ninth, and District of Columbia Circuits hold otherwise. *See, e.g., Faysound Ltd. v. United Coconut Chemicals, Inc.,* 878 F.2d 290, 295 (9th Cir. 1989) (presence of Swiss

defendant, along with New York defendant, in action by Hong Kong plaintiff defeated jurisdiction because diversity was not complete); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290-91 (5th Cir. 1989) (no diversity jurisdiction existed to entertain action by West German corporation against Texas corporation and Cayman Islands corporation); *Eze v. Yellow Cab Co. of Alexandria, Virginia, Inc.*, 782 F.2d 1064, 1065 (D.C. Cir. 1986) (citizens of Nigeria could not maintain diversity action against citizen of Ghana and Virginia cab company because diversity was not complete); *Ed & Fred, Inc. v. Puritan Marine Insurance Corp.*, 506 F.2d 757, 758 (5th Cir. 1975) (complete diversity was absent in action by citizen of Netherlands Antilles against two defendants, one a citizen of Massachusetts, the other a citizen of Bermuda). *Cf. Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980) (no diversity where Venezuelan governmental entity sued Swiss corporation and New York corporation), *cert. denied*, 449 U.S. 1080 (1981).

The Tenth Circuit's failure to address the defect in subject matter jurisdiction brought to its attention is contrary to the teachings of the Court. The jurisdiction of a court over subject matter may be raised at any point in the proceedings. *E.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 16-19 (1950). Indeed, "every federal court, whether trial or appellate, is obliged to notice want of subject matter jurisdiction on its own motion." *Things Remembered, Inc. v. Petravca*, 516 U.S. 124, 131 n.1 (1995).

A court can determine the merits of a controversy only if jurisdiction exists at all stages of the proceeding. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). There was no independent basis for subject matter jurisdiction at the time of removal in 1995 and there remains none to this day. The Tenth Circuit nonetheless issued a *forum non conveniens* opinion of far-reaching implications.

In doing so, the Tenth Circuit's decision on the merits is in direct conflict with the decision of the Eleventh Circuit in *Pacheo de Perez v. AT&T Co.*, 139 F.3d 1368, 1372 & n.4 (11th Cir. 1998), which rejected the contention that a reviewing court need not decide subject matter jurisdiction before reach-

ing *forum non conveniens,* and the decision of this Court in *Steel Co. v. Citizens for a Better Environment,* 118 S. Ct. 1003, 1012-13 (1998), in which the Court dispelled any notion that an appellate court may assume jurisdiction for purposes of passing upon the merits of a controversy.

Lack of subject matter jurisdiction should be considered by the Court, which has the authority to deny its own jurisdiction, and that of other courts of the United States, where jurisdiction does not affirmatively appear in the record. *Mansfield, supra,* 111 U.S. at 383-85.

"The doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." *Gilbert, supra,* 330 U.S. at 504. The Tenth Circuit has held *forum non conveniens* to apply in the absence of jurisdiction. The Court's intervention is warranted.

II. THE TENTH CIRCUIT'S *FORUM NON CONVENIENS* DISMISSAL ON A "BARE MINIMUM OF EVIDENCE" CONFLICTS WITH DECISIONS OF THIS COURT, DECISIONS OF OTHER CIRCUITS, AND ITS OWN PRECEDENT.

This case presents an important question regarding the nature and sufficiency of the factual showing required to be made by a party moving to dismiss for *forum non conveniens* and the record necessary for the court to conduct the required analysis.

In seeking dismissal on *forum non conveniens* grounds, Cessna and Pratt & Whitney Canada were compelled to make a "clear showing" of either (1) oppression and vexation out of proportion to the plaintiff's convenience or (2) considerations affecting the court's own administrative and legal problems. *Koster v. Lumberman's Mutual Casualty Co.,* 330 U.S. 524 (1947). To make this clear showing, Cessna and Pratt & Whitney Canada were obligated to "provide enough information to enable the District Court to balance the parties' interests." *Reyno,* 454 U.S. at 258.

The district court here made sweeping findings with regard to categories of witnesses and documents accessible to defendants in France. (App. 2a, 31a-32a). Unfortunately, the

four page excerpt from the Hague Convention (akin to attaching a copy of a case or other legal authority rather than supplying evidence) and the other three pages of "documentary evidence" alluded to by the Tenth Circuit — and attached as pages 55a-57a of the appendix — say nothing about evidence in France not available to Cessna through other means.

Both the district court and the court of appeals focused on language in *Piper Aircraft Co. v. Reyno* that a moving party need not "submit affidavits" to meet its burden. *Reyno,* 454 U.S. at 258. The Court was concerned in *Reyno* that "[r]equiring extensive investigation would defeat the purpose of the motion." *Id.* The Court therefore declined to issue a brightline rule that a defendant must always submit overly detailed affidavits listing all of his trial witnesses and the substance of all of their trial testimony in order to carry its burden of proof. *Id.*

This Court's decision in *Reyno* does not stand for the proposition that supporting affidavits are not required at all. As the Court noted in *Reyno,* both of the defendants in that case "submitted affidavits describing the evidentiary problems they would face if the trial were held in the United States." *Reyno,* 454 U.S. at 259.[2]

The Tenth Circuit's holding lessening the factual showing required to be made by a moving party has drastically revised the governing *forum non conveniens* standard to one which ignores a moving party's burden of proof and the duty of the court, trial and reviewing, to thoroughly survey the record to balance convenience and to ascertain whether that balancing was reasonable. This is a very different standard from that recognized by this Court.

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[2]Those evidentiary problems were not present in this case. The aircraft in *Reyno* was operated and maintained for years outside this country. The maintenance facilities were outside the reach of United States courts and could not be impleaded as third-party defendants. 454 U.S. at 239, 242. In this case, the aircraft was brand new. There are no potentially responsible third-parties outside the United States nor did either defendant ever so contend.

The decision of the court below also is inconsistent with post-*Reyno* cases from other circuits, as well as its own precedent, holding that a defendant which does not submit supporting affidavits or who submits conclusory evidence does not meet its burden of persuasion, particularly where, as here, the plaintiff submits opposing affidavits or other substantial contrary evidence. *See, e.g., Rivendell Forest Products, Ltd. v. Canadian Pacific, Ltd.*, 2 F.3d 990, 993 (10th Cir. 1993) (the defendant made its arguments regarding witnesses and evidence in briefs whereas the plaintiff provided a deposition detailing names and states of residency of nine witnesses it intended to call); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991) (the defendants did not submit any information or affidavits to support their conclusory allegations that "[a]ll of the occurrence witnesses. . .reside in the alternate forum"); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 41 (3d Cir. 1988) (the defendants submitted no affidavits or evidence other than a pleading filed in the alternate forum arising from the same plane crash while the plaintiffs "submitted several extremely detailed affidavits in opposition to the defendants' motion to dismiss"). *See also Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1380 (5th Cir. 1988) (factual showing made by a moving party found to suffice where the defendants submitted motions detailing particular facts which support *forum non conveniens* dismissal which were uncontroverted by the plaintiff).

"A bare minimum of evidence" is tantamount to no evidence at all. Allowing a defendant to prevail simply because it produces one or two pieces of paper "appears to shift the burden to plaintiffs to convince the court their choice is more convenient than the alternative forum." *Reid-Walen, supra*, 933 F.3d at 1396.

The decision of the Tenth Circuit squarely conflicts with the approach taken in the Third Circuit, which requires the district court to take a hard look at the evidence relating to liability, particularly where a plaintiff has shown much of the evidence needed to establish liability is in the forum. "If the plaintiffs do not prove liability, they have lost the case." *Lony v. E.I. duPont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir.

1989) (cautioning that "[w]here liability evidence predominates in the plaintiff's choice of forum, the court should be quite cautious in disregarding such an essential fact of the litigation").

The doctrine of *forum non conveniens* should be applied with an even hand. If the Tenth Circuit's decision is allowed to stand, a ruling made in the absence of subject matter jurisdiction, *forum non conveniens* dismissals will become the rule, rather than an exception sparingly implicating the power of the federal courts to decline to exercise jurisdiction over a case or controversy. The Court's intervention and supervisory control is warranted.

CONCLUSION

For the reasons set forth above, petitioner urges that the petition for writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner

**Counsel of Record*

Dated: February 8, 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-3164

VIRGINIE GSCHWIND, in her own right and administratix of the estate of Cyril Gschwind and Alexandra Gschwind,
Plaintiff-Appellant,

v.

CESSNA AIRCRAFT COMPANY;
PRATT & WHITNEY CANADA, INC.,
Defendants-Appellees.

ORDER

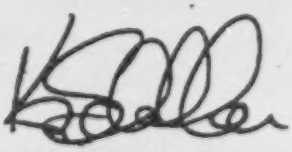
Filed November 10, 1998

Before TACHA, McWILLIAMS and KELLY, *Circuit Judges.*

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: 
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-3164

VIRGINIE GSCHWIND, in her own right and administratix of the estate of Cyril Gschwind and Alexandra Gschwind,
Plaintiff - Appellant,

v.

CESSNA AIRCRAFT COMPANY;
PRATT & WHITNEY CANADA, INC.,
Defendants - Appellees.

ORDER

Filed November 10, 1998

Before TACHA, McWILLIAMS and KELLY, *Circuit Judges.*

Appellee's motion to publish the order and judgment filed on September 18, 1998, is granted. The published opinion is attached to this order.

Entered for the Court
Patrick Fisher, Clerk of Court

By:_____
Keith Nelson
Deputy Clerk

FILED
United States Court of Appeals
Tenth Circuit
SEP 18, 1998
PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 97-3164

VIRGINIE GSCHWIND, in her own right and administratix of the estate of Cyril Gschwind and Alexandra Gschwind,

Plaintiff - Appellant,

v.

CESSNA AIRCRAFT COMPANY; PRATT & WHITNEY CANADA, INC.,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D. Ct. No. 96-1269-MLB)

Catherine B. Slavin, Wolk & Genter, Philadelphia, Pennsylvania (Ken. M. Peterson, Morris, Laing, Evans, Brock & Kennedy, Wichita, Kansas, with her on the briefs), appearing for Appellant.

John C. Nettels, Jr., Morrison & Hecker, Wichita, Kansas, appearing for Appellee Cessna Aircraft Company.

Curtis C. Landherr, Baker, Sterchi, Cowden & Rice, L.L.C., Overland Park, Kansas, (John W. Cowden, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, Missouri, with him on the brief), appearing for Appellee Pratt & Whitney Canada, Ltd.

Before TACHA, McWILLIAMS, and KELLY, *Circuit Judges.*
TACHA, *Circuit Judge.*

This case arises from a plane crash that occurred in France and killed the pilot, Cyril Gschwind. Defendants, the Cessna Aircraft Company and Pratt & Whitney Canada, moved for dismissal based on *forum non conveniens.* The district court granted their motion, finding that France would be a significantly more convenient forum for this dispute. We take jurisdiction of the plaintiff's appeal pursuant to 18 U.S.C. § 1291 and affirm.

On August 16, 1993, Cyril Gschwind, a French citizen living in Belgium, died when the Cessna Caravan 208B that he was piloting crashed near Cannes, France. At the time of his death, the decedent was the European distributor for Cessna Caravan Aircraft. His company, Aviation & Services Europe, had offices in Mandelieu, France. Nonetheless, Mr. Gschwind's business brought him to the United States on a number of occasions, and he had been trained to fly the Cessna Caravan in Miami, Florida.

There may have been one eyewitness to the crash, which was investigated by French authorities. The aircraft involved in the accident had only approximately fifty hours of actual flight time; no maintenance had been performed on it since it had left the United States. Although French authorities sent some components of the aircraft to the United States for testing, the wreckage is still in France.

A lawsuit relating to the financial position of the decedent's business at the time of his death was filed in Cannes, France, shortly after the crash. In the suit, a British aircraft company named Titan alleges that Gschwind kept money that was to be used for the purchase of a Cessna aircraft. This evidence, along with a note written by Mr. Gschwind to a business associate named Peter Bennedsen and faxed to him shortly before the crash, suggests the possibility of suicide. The note read:

> I am obliged to take a flight today with which I don't feel comfortable at all. Should anything happen to me, and since you are the only person I trust, could you please: (1) wire back the extra money you receive from me [to a

> Swiss bank account, and] (2) take care as best you can, of the interest of my small family (wife & baby).

Appellant App. at 295.

Mr. Gschwind's widow, Virginie Gschwind, brought this wrongful death action against Cessna, the Kansas manufacturer of the Caravan 208B aircraft, Pratt & Whitney Canada, a Quebec company that manufactured the engine used in the Caravan, and Hartzell Propeller Inc., an Ohio company that makes some (but not all) of the propellers for the Caravan aircrafts. Plaintiff based her action on various product liability and negligence claims. The parties eventually dismissed Hartzell from the case by stipulation.

The Plaintiff sued in the Court of Common Pleas for Montgomery County, Ohio, and the Defendants removed to federal court. Defendant Cessna then filed a motion to dismiss on the grounds of *forum non conveniens* or for a change of venue to the U.S. District Court for the District of Kansas. Pratt & Whitney moved to dismiss for lack of personal jurisdiction or, in the alternative, for dismissal based on *forum non conveniens*. The Magistrate handling the case recommended that Defendants' *forum non conveniens* motions be denied. The Magistrate did, however, grant the lesser request of a transfer to the District of Kansas. The case was transferred to the District of Kansas, where the Defendants appealed the Magistrate's *forum non conveniens* recommendation. The district court agreed with Defendants and dismissed the case based on *forum non conveniens*. The district court conditioned its dismissal on Defendants' agreement to: (1) produce their respective employees, officers and records in France, at their own cost; (2) make good faith and reasonable efforts to obtain the attendance of former employees and officers; (3) waive any limitations defenses that would not have been available to them had plaintiff initiated her litigation in France on the same day she filed her complaint in Ohio; (4) transport all physical evidence brought from Europe back to France; (5) voluntarily enter their appearance before the court when plaintiff initiates her litigation in France; and (6) consent to

reinstatement of this case in its present posture in the event that the French courts refuse to accept jurisdiction over the matter.

I.

– "[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 256 (1981). There are two threshold questions in the *forum non conveniens* determination: first, whether there is an adequate alternative forum in which the defendant is amenable to process, *see id.* at 254 n.22, and second, whether foreign law applies, *see Rivendell Forest Prod., Ltd. v. Canadian Pac. Ltd.,* 2 F.3d 990, 994 (10th Cir. 1993). If the answer to either of these questions is no, the *forum non conveniens* doctrine is inapplicable. If, however, the answer to both questions is yes, the court goes on to weigh the private and public interests bearing on the *forum non conveniens* decision.

The private interest factors to be considered are: (1) the relative ease of access to sources of proof; (2) availability of compulsory process for compelling attendance of witnesses; (3) cost of obtaining attendance of willing non-party witnesses; (4) possibility of a view of the premises, if appropriate; and (5) all other practical problems that make trial of the case easy, expeditious and inexpensive. *See Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947). The public interest factors include: (1) administrative difficulties of courts with congested dockets which can be caused by cases not being filed at their place of origin; (2) the burden of jury duty on members of a community with no connection to the litigation; (3) the local interest in having localized controversies decided at home; and (4) the appropriateness of having diversity cases tried in a forum that is familiar with the governing law. *See id.* at 508-09.

As the district court noted, normally there is a strong presumption in favor of hearing the case in the plaintiff's chosen forum. *See Piper*, 454 U.S. at 255. That presumption is overcome "only when the private and public interest factors clearly point towards trial in the alternative forum." *Id.* A for-

eign plaintiff's choice of forum, however, warrants less deference. *See id.* at 256. When the plaintiff is foreign, the private and public interest factors need not so heavily favor the alternate forum. *See id.*

Plaintiff alleges error by the district court on a number of grounds. First, Plaintiff complains that the district court erred in its consideration of the availability of an alternate forum, its determination that French law will govern the case, and its weighing of the private and public interest factors. Second, Plaintiff contends that Defendant failed to provide a sufficient factual record in support of its motion.

Our standard for reviewing a district court's decision to grant or deny a motion for *forum non conveniens* is as follows:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Id. at 257. Nonetheless, appellate review is not perfunctory; we carefully examine the reasoning of the district court. *See Rivendell,* 2 F.3d at 992.

A.

We address first the district court's alleged error in determining that there is an adequate and available alternate forum—in this case, France. Plaintiff correctly notes that the defendant bears the burden of proving that an adequate alternative forum exists. *See, e.g., El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 677 (D.C. Cir. 1996); *Schertenleib v. Traum,* 589 F.2d 1156, 1160 (2d Cir. 1978). The defendant must prove that the alternative forum is both available and adequate. *Kamel v. Hill-Rom Co.,* 108 F.3d 799, 802 (7th Cir. 1997); *Reid-Walen v. Hansen,* 933 F.2d 1390, 1393 n.2 (8th Cir. 1991).

In this case, Defendants agreed to be subject to suit in France. That concession is generally enough to make the alternative forum available. *See Piper,* 454 U.S. at 254 n.22 ("Ordi-

narily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction.") (quoting *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 506-07 (1947)); *Magnin v. Teledyne Continental Motors,* 91 F.3d 1424, 1429 (11th Cir. 1996) (finding France an available alternative forum where the defendants had agreed to French jurisdiction); *R. Maganlal & Co. v. M.G. Chem. Co.,* 942 F.2d 164, 167 (2d. Cir. 1991) (finding India was adequate and available forum where defendant agreed to submit to Indian court jurisdiction); *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.,* 918 F.2d 1446, 1450 (9th Cir. 1990) (agreement to be subject to jurisdiction of Philippine courts established available alternate forum). Plaintiff points out that there was no evidence that the French courts would in fact accept jurisdiction, even with Defendants' consent. Defendants certainly would have greatly assisted this court's review by providing evidence of relevant French law. Nevertheless, the district court determined that France is an available alternate forum, and, for several reasons, we find no clear error in this conclusion.

First, French law recognizes product liability and wrongful death actions, *see* Martindale-Hubbell, *France Law Digest in Martindale-Hubbell International Law Digest* FRA-31 (Coudert Brothers and Coudert Freres eds., 1998); *Piper,* 454 U.S. at 254 n.18 ("Rules roughly equivalent to American strict liability are effective in France . . . ."); *Mediterranean Golf, Inc. v. Hirsh,* 783 F. Supp. 835, 841 n.6 (D.N.J. 1991) (noting that French law provides a broad statutory basis for tort liability). Second, Plaintiff herself admitted in the record that she could bring a viable action against defendants in French courts in Digne, France. Appellant App. at 210. Finally, the district court conditioned its dismissal for *forum non conveniens* on Defendants' consent to have the action reinstated in the District of Kansas if the French courts refuse jurisdiction. That condition, combined with the court's findings on French law, is enough to ensure that the case will be heard; in fact, such an approach was explicitly approved in *Mercier v. Sheraton International, Inc.,* the case cited by Plaintiff. *See Mercier v. Sheraton Int'l, Inc.,* 935 F.2d 419, 426 (1st Cir. 1991) ("At a minimum, the district court should have granted a dis-

missal conditioned on the [foreign] courts' actually taking cognizance of a substitute action."). Therefore, we find no error in the district court's conclusion that an alternate forum is available.

Plaintiff also objects to the finding that the French court system is adequate. First, Plaintiff's brief implies that the French system is inadequate because of the delay that might be involved in a French proceeding. According to Plaintiff, the French courts would stay a civil action until the completion of their criminal proceedings. Such a delay does not render the French courts inadequate, as one court noted in an analogous case:

> Regrettably for [the plaintiff], procedural differences between forums do not bar a *forum non conveniens* dismissal in the absence of a "complete denial of due process." Delays in an alternative forum's judicial system are not sufficiently harmful of due process to prevent dismissal on the ground of *forum non conveniens* . . . .
>
> . . . .
>
> . . . . The French proceeding remains adequate, even if the criminal charge stays the civil process.

Broadcasting Rights Int'l Corp. v. Societe du Tour de France, S.A.R.L., 708 F. Supp. 83, 85-86 (S.D.N.Y. 1989) (citations omitted).

Second, Plaintiff argues that the French system was inadequate because Defendants were not required to waive *all* of their limitations defenses in the foreign country. Instead, the district court only required that Defendants waive limitations defenses that would not have been available to them in France on the day Gschwind filed her initial complaint in the Ohio system. Courts of appeals have approved conditions similar to the one given by the district court. *See, e.g., Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Zekic v. Reading & Bates Drilling Co.*, 680 F.2d 1107, 1108 (5th Cir. 1982), *overruled on other grounds, In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d. 1147, 1163-64 n.25 (5th Cir. 1987). Moreover, the remedy provided by the alternate forum need not be the same as that provided

by the American court; only when the alternate forum's remedy is "so clearly inadequate . . . that it is no remedy at all" should the unfavorable change in law weigh in the court's determination. *Piper*, 454 U.S. at 254-55. We do not find the French system inadequate on this count.

B.

Plaintiff next asserts that the district court erred in its determination that, under applicable choice of law principles, French law will govern the case. As we noted, choice of law is a threshold determination for application of *forum non conveniens.* We review choice of law decisions de novo. *Needham v. Phillips Petroleum Co. of Norway,* 719 F.2d 1481, 1483 (10th Cir. 1983). The district court correctly determined that Ohio's choice of law jurisprudence governs this suit and carefully analyzed the factors under Ohio law. After independently reviewing the record and applicable law, we agree with the analysis and conclusion of the district court. Plaintiff asserts that the district court gave too little weight to Kansas as the alleged situs of the tortious conduct and to the interest of Kansas in the litigation. The district court, however, properly recognized that there are numerous places where the tortious conduct could have occurred, and it gave the interest of Kansas adequate weight.

C.

Plaintiff's third group of arguments relates to the district court's weighing of the private interest factors. Plaintiff contends that the district court failed to assign sufficient weight to the fact that all of the evidence relating to the aircraft's component certification, and much of the evidence relating to Mr. Gschwind's flight training and business dealings, is located in the United States. The district court analyzed this evidence when considering the first private interest factor: relative ease of access to sources of proof.

With respect to the component certification and flight training records, the district court made the following conclusion: "The parties themselves, their employees and records,

are equally accessible in both France and Kansas because the parties are subject to personal jurisdiction in both locations." Dist. Ct. Mem. & Order at 20. The court determined that virtually all of the evidence relating to the products liability claim fell into this category of evidence.

The district court ultimately found that this factor favored Defendants because most of the evidence relevant to the defendants' claim that Mr. Gschwind was either contributorily negligent or committed suicide was more readily available in France. This evidence included, among other things, accounts of the decedent's business dealings. Although Plaintiff claims that much of the business-related evidence is in the United States, the district court found that the decedent was doing business primarily in Europe. We do not find this conclusion clearly erroneous. Furthermore, because the district court performed a reasoned analysis of this factor, we find that the district court did not abuse its discretion in weighing it in favor of Defendant.

Plaintiff further argues that the district court erred by failing to state the amount of deference due to this foreign plaintiff's choice of forum. Plaintiff relies on *Lony v. E.I. DuPont de Nemours & Co.*, 886 F.2d 628, 633 (3d Cir. 1989) and *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 179 (3d Cir. 1991). Those cases, however, require nothing more than a recognition on the part of the district court that a foreign plaintiff's choice of forum merits some deference, but not as much as that of a domestic plaintiff. As the Third Circuit said:

> [W]e do not read this language [from *Lony*] as requiring a court somehow to mark on a continuum the precise degree of deference it accords a plaintiff's choice. Indeed, the district court in this case expressly eschewed such an illusory exercise, stating frankly that it was "impossible to quantify" the applicable level of deference. . . . Specifically, the court stated that defendants must establish a "strong preponderance in favor of dismissal."

Lacey, 932 F.2d at 179. In this case, the district court stated that when, as here, the plaintiff is foreign, the plaintiff's choice of forum "deserves less deference." Dist. Ct. Mem. & Order

at 11 (quoting *Piper,* 454 U.S. at 25). This statement of the law is correct, and we find no abuse of discretion by the district court.

Plaintiff also argues that the district court erred in weighing the private interest factors because it did not consider that Cessna, a party seeking dismissal, was a forum resident. Plaintiff contends that this fact should have weighed heavily against dismissal. It is true that a forum resident should have to make a stronger case than others for dismissal based on *forum non conveniens. See Reid-Walen V. Hansen,* 933 F.2d 1390, 1395 (8th Cir. 1991).

For a number of reasons, however, we conclude that the district court did not abuse its discretion by failing to mention this consideration. In this case, the forum resident, Cessna, was not the only defendant arguing for dismissal based on *forum non conveniens.* Pratt & Whitney, a company located in Longueil, Quebec, had also moved for dismissal. Thus, the strength of Plaintiff's argument is diluted by at least one-half. It is further diluted by the fact that Cessna is an international organization; the fact that a defendant is a resident of the forum has more weight in the *forum non conveniens* analysis when the defendant is an individual rather than a broad-based corporation. *See id.* Furthermore, Cessna's residency did weigh against it in this case, though in a slightly different context. The district court, in its analysis of the public interest factors, determined that the case would not excessively burden Kansas citizens because Cessna's residence in Kansas gave the state a connection to the litigation. *See* Dist. Ct. Mem. and Order, at 28.

D.

Plaintiff makes only two arguments relating to the district court's evaluation of the public interest factors. First, Plaintiff indicates that the district court erred in weighing the "administrative difficulties" factor in favor of Defendants. With respect to this factor, the district court said that "[a]llowing the case to proceed in this court will unduly contribute to the congestion of the court's docket. There are already numerous civil

motions that have been pending before this court for more than six months." Dist. Ct. Mem. & Order, at 27. According to Plaintiff, it is unfair to hold the court's congested docket against her in light of the fact that all of the pending motions in this case had been filed by Defendants.

Plaintiff misinterprets the court's statements. The court was not referring to congestion in this particular case, but rather a build-up of motions and cases before the District of Kansas as a whole. Under *Piper* and *Gulf Oil,* it is proper for the district court to consider the administrative difficulties this case would pose to the District of Kansas in deciding the *forum non conveniens* issue.

Next, Plaintiff asserts that the district court placed too much reliance on its unfamiliarity with French law. That consideration cannot be dispositive where the balance of factors demonstrates that the plaintiff's choice is an appropriate one. *See Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.,* 2 F.3d 990, 994 (10th Cir. 1993). Considering, however, that we have determined that the district court did not err in weighing the administrative burden against the plaintiff, along with the fact that France had a greater "localized" interest in the matter, it can hardly be said that the district court relied solely on its unfamiliarity with French law. We find the district court's analysis of the factors to be reasonable. There is no abuse of discretion with regard to the public interest factors.

II.

Plaintiff's second argument is that Defendants failed to provide a factual record sufficient to support a finding that the public and private interests weighed in favor of dismissal. In *Piper,* the Supreme Court said:

> [The Court of Appeals] suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary. Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the

> reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interests.

Piper, 454 U.S. at 258. Plaintiff notes, correctly, that the defendant's showing has been found insufficient in cases in which the party failed to put any relevant information in the record. *See Rivendell,* 2 F.3d at 993; *Reid-Walen,* 933 F.2d at 1396. The amount of information needed to enable the district court to perform the balancing test "depends on the facts of the particular case." *Lacey v. Cessna Aircraft,* 862 F.2d 38, 44 (3d Cir. 1988).

In *Lacey,* the defendants argued that pilot error may have caused the crash that gave rise to the lawsuit, as Defendants here do. In *Lacey,* however, the defendants did not support their allegations with any factual materials, and therefore the "failure to provide any record support for their contentions precluded the district court from scrutinizing the substance of the dispute between the parties . . . ." *Id.* In this case, Defendants have come forward with documentary evidence in support of their theory that the decedent had been having business difficulties shortly before his death and that he may have taken his own life. *See* Appellant's App. at 293-95. Defendants also provided the district court with a copy of pertinent articles of the Hague Evidence Convention, which shed light on the ability of the United States to compel attendance of unwilling foreign witnesses. Admittedly, Defendants have presented a bare minimum of evidence necessary for the court to conduct an informed balancing of factors. This court certainly would have benefitted from additional evidence in the record. Nevertheless, in the context of this case, the items offered by defendant gave the district court enough information to conduct the balancing, and we find no abuse of discretion.

Finally, Plaintiff argues that two of the district court's factual findings are unsupported by the record. Plaintiff first takes issue with the district court's conclusion that most sources of proof relevant to Defendants' claim of contributory

negligence and/or suicide will be more readily available in France. We stated previously in Part I.C. that we do not find the district court's conclusion with regard to this evidence clearly erroneous.

Plaintiff also contends that there is no record evidence for the fact that the decedent regularly conducted business in France. Not only does this fact have support in the record, but Plaintiff concedes it in her brief. *See A*ppellant's Br. at 19.

III.

The district court did not err in its decision to apply French law to the case, and it did not abuse its discretion in finding France to be an available alternate forum or in balancing the relevant private and public interest factors in this case. Furthermore, the factual findings of the district court are not clearly erroneous. We AFFIRM.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VIRGINIE GSCHWIND, *Plaintiff,*	RALPH L. DELOACH, CLERK
vs.	By _____ Deputy
THE CESSNA AIRCRAFT COMPANY	Docket No. 96-1269-MLB
and	
PRATT & WHITNEY CANADA, LTD, *Defendants.*	ENTERED ON THE DOCKET DATE: 3-20-97

MEMORANDUM AND ORDER

Before this court are the following motions, memoranda, report and recommendation, and objections related to the issue of forum non conveniens[1]:

1. Defendant Cessna Aircraft Company's Motion to Dismiss on the Grounds of Forum Non Conveniens . . ., filed September 22, 1995 (Doc. 7);

2. Plaintiff's Memorandum of Law in Opposition to [Doc. 7], filed February 15, 1996 (Doc. 45);

3. Defendant Cessna's Reply Brief in Support of Dismissal for Forum Non Conveniens . . ., filed February 29, 1996, (Doc. 50);

4. Plaintiff's Sur-reply in Opposition to [Doc. 7], filed March 15, 1996 (Doc. 54);

5. Defendant Cessna's Sur-Response in Support of [Doc. 7], filed April 1, 1996 (Doc. 62);

6. Motion of Pratt & Whitney Canada Inc. . . . to Dismiss Under the Doctrine of Forum Non Conveniens, filed February 16, 1996 (Doc. 46);

1. Documents 7, 45, 46, 50, 53, 54, 55, 56, 62, 63, 75, 79, and 80 were filed in the United States District Court for the Southern District of Ohio.

7. Plaintiff's Memorandum of Law in Opposition to [Doc. 46], filed March 11, 1996, filed March 15, 1996 (Doc. 53 as corrected by Doc. 55);

8. Notice of Filing of Additional Evidence in Opposition to [Doc. 46], filed March 15, 1996 (Doc. 56);

9. Defendant Pratt & Whitney Canada's Partial Reply Brief in Support of [Doc. 46], filed April 5, 1996 (Doc. 63);

10. Report and Recommendations; Decision and Order [Doc. 75] of Magistrate Judge Michael R. Merz of the Southern District of Ohio, filed July 3, 1996;

11. Defendant Cessna's Objections to [Doc. 75] as to Forum Non Conveniens/Cessna's Petition for Interlocutory Appeal, filed July 23, 1996 (Doc. 80);

12. Objections to [Doc. 75] as to Forum Non Conveniens and Pratt & Whitney's Canada's Petition for Interlocutory Appeal, filed July 23, 1996 (Doc. 79);

13. Cessna's Supplemental Memorandum In Support of Its Motion to Dismiss For Forum Non Conveniens, filed October 1, 1996 (Doc. 110);

14. Plaintiff's Supplemental Memorandum of Law on the Issue of Forum Non Conveniens, filed October 1, 1996 (Doc. 111);

15. Defendant Pratt & Whitney Canada, LTD.'s Supplemental Brief in Support of Dismissal for Forum Non Conveniens, filed October 1, 1996 (Doc. 112); and,

16. Cessna's Amendment to Its Supplemental Memorandum In Support of Its Motion to Dismiss for Forum Non Conveniens, filed October 2, 1996 (Doc. 113).

I. NATURE OF CASE

This is a wrongful death and survival action commenced by Virginie Gschwind ("Gschwind") in the Court of Common Pleas of Montgomery County, Ohio on August 14, 1995. The Cessna Aircraft Company removed the case to the U.S. District Court for the Southern District of Ohio on September 19, 1995 (Doc. 1). Over the following eighteen months the parties or the court filed the documents noted above on the issue of forum non conveniens. In the July 3, 1996 report (Doc. 75)

referred to above, Magistrate Judge Merz recommended that defendants' motions to dismiss for forum non conveniens be denied and also ordered that the case be transferred to the District of Kansas. As noted, defendants promptly objected to Judge Merz' recommendation on the issue of forum non conveniens and they asked the court to grant an interlocutory appeal on this issue if the court affirms the magistrate's recommendation (Docs. 79 and 80).

II. GSCHWIND'S PROCEDURAL OBJECTIONS

Gschwind claims that defendants are procedurally barred from pursuing their motions to dismiss for forum non conveniens (Doc. 111 at 2 and 3). Gschwind first argues that parties are judicially estopped from taking contrary positions. She says that judicial estoppel applies to Cessna because it sought and obtained a change of venue from Ohio to Kansas, and likewise applies to Pratt & Whitney because it failed to object to the Magistrate's transfer of venue to the District of Kansas (Doc. 111 at 2-3).

Cessna's original motion sought dismissal for forum non conveniens (Doc. 7, Brf. at 1). Within the same document Cessna included a request for a change of venue from Ohio to Kansas. It was an alternative request contingent upon the court's rejection of its motion to dismiss on the ground of forum non conveniens.

> Cessna Aircraft Company ("CESSNA"), through its attorneys, requests that this Court dismiss this matter on the grounds of forum non conveniens or, in the alternative, change venue in this matter to Kansas, for the following reasons:
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> * * *
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> 5. The factors and law identified in the attached and incorporated brief support a finding that this matter must be dismissed on the grounds of forum non conveniens.
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> 6. In the alternative, if this Court believes dismissal is not warranted, this Court should change venue in this matter to Kansas . . . .

(Doc. 7, Mot. at 2.) Cessna fully devoted the first half of its brief to the forum non conveniens issue. Cessna began the next section of its brief with the following sentence:

> If this Court does not agree that this matter should be dismissed for the reasons stated above [forum non conveniens], CESSNA requests that this matter be transferred to the federal district courts of Kansas.

(Doc. 7 at 8.) From this and subsequent documents, the court finds it clear that Cessna sought, first and foremost, dismissal on the grounds of forum non conveniens.

Both Cessna's motion to dismiss for forum non conveniens and its 28 U.S.C. § 1404 request for change of venue are grounded in the same consideration: convenience. Cessna asserts that France is the most convenient forum, and that Kansas is the second most convenient forum. Cessna's request for alternative relief was fully consistent with its view of the matter and with the law.

Judge Sandra Beckwith of the Southern District of Ohio referred Cessna's motion to Magistrate Merz. Judge Merz, as a magistrate, could only make a recommendation as to forum non conveniens, but he did have authority to transfer the case to Kansas. Upon consideration, Judge Merz recommended against granting defendants' motions to dismiss on the ground of forum non conveniens (Doc. 75 at 2), and then proceeded to consider and grant Cessna's § 1404 request for change of venue (Doc. 75 at 5-6).[2] This court knows of no authority, and Gschwind cites none, supporting her argument that a party must oppose or repudiate requested alternative relief until it can obtain a final ruling on its principal request for relief. Even if such a rule did exist in some circumstances, it would not apply here where the theory supporting alternative relief is entirely consistent with the principal request. The court finds that defendants' acceptance of the transfer to Kansas does not estop them from pursuing their forum non conveniens motions.

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2. Because of the immediate order to transfer, Judge Beckwith never reviewed Judge Merz' recommendation on forum non conveniens.

Gschwind argues that a second consideration bars Pratt & Whitney from pursuing the issue of forum non conveniens. Gschwind claims that Pratt & Whitney's motion to dismiss for lack of personal jurisdiction and its contingent, alternative request for dismissal for forum non conveniens are inconsistent. She says that because a defendant cannot pursue inconsistent arguments at the pleading and preliminary motions stage, Pratt & Whitney's forum non conveniens motion should be dismissed. The court disagrees.

First, a defendant may pursue conflicting theories at the preliminary motion and pleading stage of litigation. Fed. R. Civ. P. 8(e)(2) ("A party may also state as many separate . . . defenses as the party has regardless of consistency"); *Independent Enterps. Inc. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1175 (3rd Cir. 1997); *see Brownlow v. Aman*, 740 F.2d 1476, 1490 (10th Cir. 1984). Second, even if a defendant could not pursue conflicting theories, the court finds nothing inconsistent in Pratt & Whitney's requests. Paraphrased, Pratt & Whitney argued that the court had no personal jurisdiction over it, but, should the court disagree and force Pratt & Whitney to litigate, the case ought to be tried in the most convenient forum, France (Doc. 46 at cov. pg. and 10). Questions of convenience are separate from questions of a court's jurisdiction over a defendant. Though some of the factual considerations may overlap, many will not, and the two inquiries serve distinct purposes. As a result, the court shall overrule Gschwind's second objection to Pratt & Whitney's motion to dismiss.

Gschwind's third procedural claim is that Pratt & Whitney waived its forum non conveniens argument by failing to raise it in its answer (Doc. 53 at 8-9). Federal Rule of Civil Procedure 12(b) requires motions for "improper venue" to be brought no later than in the first responsive pleading. Failure to do so constitutes waiver. Fed. R. Civ. P. 12(h)(1). "Improper venue" exists when a plaintiff brings suit in a court with subject matter jurisdiction, but in violation of the venue statutes of 28 U.S.C. § 1391 et seq. *See* 15 Charles Alan Wright et al., Federal Practice and Procedure § 3801, last para. (2d ed. 1986) ("This distinction between the court's power to adjudicate and

the place where that authority may be exercised must always be recognized .... [I]f the statutory rules on venue are not followed, and objection is made on the ground of improper venue, the action cannot be heard in that district"). Pratt & Whitney raised a claim of improper venue in its answer and amended answer (Docs. 8 and 11).

Gschwind argues, and the court agrees, that Pratt & Whitney's forum non conveniens dismissal request is not the same as a claim of improper venue (Doc. 53 at 8). *See* 15 Charles Alan Wright et al., Federal Practice and Procedure § 3842 (2d ed. 1986) (stating that a request for a change to a more convenient forum presupposes technically proper venue). Gschwind goes on to assert, however, that a dismissal request for forum non conveniens must be pled no later than the first responsive pleading because it is an affirmative defense. Federal Rules of Civil Procedure 8(c) and 12(b) do require that any matter constituting an avoidance or a legal or factual defense be pled in the first responsive pleading. Like a § 1404 motion for a change of venue, however, a forum non conveniens motion is not an affirmative defense and need not be so pled. "[T]here is no time limit on when a motion to dismiss on the ground of forum non conveniens can be made." 15 Charles Alan Wright et al., Federal Practice and Procedure § 3828 (2d ed. 1986). *See also id.* § 3844 ("A party who has waived his objection to venue by failure to assert it at the proper time is not for that reason precluded from moving for a change of venue"[3]). For this reason, Gschwind's final procedural objection to Pratt & Whitney's motion shall be denied.

III. BACKGROUND

The following facts do not appear to be in dispute. This case arises out of the crash of a Cessna Caravan 208B aircraft near Cannes, France on August 16, 1993. Cyril Gschwind, a citizen of France and resident of Belgium, was the only person aboard the aircraft and he died in the crash. Plaintiff is the

3. "The forum non conveniens doctrine is a rule of venue ...." *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993).

wife of Cyril Gschwind, the mother of his child, and the administrator of his estate. She is a citizen and resident of Belgium.

The decedent was the European distributor of the Caravan product line. Most of his aircraft sales were in Europe, and most of his financial records and business associates are in Europe. There may have been one French eyewitness to the aircraft's descent and crash. At the time of the accident the plane was subject to French air traffic control. French police, aviation authorities, and medical examiners investigated the accident. French air traffic controllers and radar traffic controllers made relevant observations and reports of the accident. Flight Safety International trained decedent to fly Caravan airplanes in the United States. There are witnesses to decedent's character and pilot skills and experience in both Europe and the United States.

The aircraft was virtually new with fewer than fifty flight hours logged at the time of the crash. It was designed and built in Wichita, Kansas by Cessna. Cessna is a Kansas corporation with its principal place of business in Wichita. The plane's propeller appears to have been built in Vandalia, Ohio by an unincorporated division of Cessna called the McCauley Accessory Division. It is unclear whether the propeller was designed in Vandalia, Ohio or Wichita, Kansas.[4]

The plane's engine was built by Pratt and Whitney Canada. Pratt & Whitney is a corporation organized and existing under the laws of the Province of Quebec, Canada with its principal place of business in Longueuil, Quebec. All records related to the design, manufacturing, and airworthiness of the aircraft are in the United States or Quebec. Both defendants sent their own crash investigators to investigate the cause of the crash.

Gschwind could maintain her wrongful death and survival action in French courts. Both defendants have agreed to be

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4. Originally Gschwind had named an Ohio propeller manufacturer as a defendant. Judge Beckwith subsequently found that that defendant had been fraudulently joined and dismissed it from the case.

subject to process in France. Cessna has agreed to make its employees and records available for discovery in France.

Gschwind's cause of action is strict liability products liability. Thus, virtually all evidence relevant to her cause of action is in North America. The vast majority of this evidence is in the custody or control of the defendants. Defendants intend to attempt to prove that decedent intentionally crashed the aircraft to commit suicide, or, alternatively, that his negligent operation of the aircraft caused the crash. Defendants contend that most of the evidence relevant to their defense is in Europe. Gschwind denies that significant discovery will be necessary in Europe.

IV. STANDARDS GOVERNING DISMISSAL FOR FORUM NON CONVENIENS

"[T]he central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 256, 102 S. Ct. 252, 266, 70 L. Ed. 2d 419 (1981).[5] Dismissal is appropriate when trial in the plaintiff's chosen forum imposes a heavy burden on the defendants or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. *Id.* at 248, 102 S. Ct. at 262. Ordinarily there is a strong presumption in favor of the plaintiff's choice of forum. *Id.* at 255, 102 S. Ct. at 266. *See Bosshard v. Wagstaff,* Nos. 90-4062 & 90-4068, 1991 WL 132432 at *1, 937 F.2d 616 (Table) (10th Cir. July 16, 1991). That presumption may be overcome "only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft Co.,* 454 U.S. at 25, 102 S. Ct. at 266. The Supreme Court noted, however, that "a foreign plaintiff's choice [of forum] deserves less deference." When the plaintiff is foreign, the presumption has less force and the private and public interest factors need not so heavily favor the alternate forum. *Id.*

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5. In diversity cases, federal law governs the determination of motions to dismiss for forum non conveniens. *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.,* 2 F.3d 990, 992 (10th Cir. 1993).

The standard for determining whether a case ought to be dismissed under the doctrine of forum non conveniens was set forth in the seminal case of *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). *See Piper Aircraft Co.,* 454 U.S. at 249, 102 S. Ct. at 262; *Needham v. Phillips Petroleum Co. of Norway,* 719 F.2d 1481, 1483 (10th Cir. 1983). There are two threshold questions. First, does an alternative forum exist? *See Gilbert,* 330 U.S. at 506-07, 67 S. Ct. at 842 ("In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process"). Second, does foreign law apply? *Rivendell Forest Prods. Ltd.,* 2 F.3d at 994. If either answer is negative, dismissal under the forum non conveniens doctrine is inappropriate. Otherwise, the court must weigh the private and public interests bearing on the question of convenience.

The private interest factors include the (1) relative ease of access to sources of proof, (2) availability of compulsory process for compelling the attendance of unwilling witnesses, (3) cost of obtaining attendance of willing witnesses, (4) possibility of a view of the premises, if appropriate, and (5) all other practical problems that make trial of the case easy, expeditious and inexpensive. *Gilbert,* 330 U.S. at 508, 67 S. Ct. at 843.

The public interest factors include (1) administrative difficulties of courts with congested dockets which can be caused by cases not being filed at their origin, (2) the burden of jury duty on members of a community with no connection to the litigation, (3) the local interest in having localized controversies decided at home, and (4) the appropriateness of having diversity cases tried in a forum which is familiar with the governing law. *Id.* at 508-09, 67 S. Ct. at 843.

Defendants have the burden of proving both that an alternative forum exists and that the case should be dismissed for forum non conveniens. *Rivendell,* 2 F.3d at 993; *Bosshard,* 1991 WL 132432 at *1. They need not, however,

> submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not

> necessary. [Defendants] have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview.

Piper Aircraft Co., 454 U.S. at 258, 102 S. Ct. at 267. Rather, defendants need only provide sufficient information to enable the court to balance the parties' interests. *Id.* Defendant's proffer must, however, support the court's conclusions. *Rivendell Forest Prods, Ltd.*, 2 F.3d at 993.

The Supreme Court has repeatedly emphasized that district courts must retain flexibility over forum non conveniens decisions. *Id.* at 249, 102 S. Ct. at 263. Thus, in *Piper Aircraft Company*, the Supreme Court reversed the Third Circuit for failing to appropriately defer to the district court's decision. "The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993) (quoting *Piper Aircraft Co.*, 454 U.S. at 257, 102 S. Ct. at 266). In *Rivendell Forest Products Ltd.*, the Tenth Circuit interpreted this to mean that while its review was "quite limited," it could nevertheless undertake "careful scrutiny" of the district court's opinion. 2 F.3d at 992 & 994.

V. ANALYSIS

A. ALTERNATE FORUM

The threshold determination identified by the Supreme Court is the existence of an alternate forum.

> At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction.

Piper Aircraft Co., 454 U.S. at 254 n. 22, 102 S. Ct. at 265 n. 22 (citing *Gilbert*, 330 U.S. at 506-07, 67 S. Ct. at 842). Both defendants have agreed to be amenable to suit in France (Docs. 7 at 10 and 79 at 2). Gschwind does not deny that she could bring her suit in France. Rather, she complains that she would have to delay her suit while the appropriate French authorities conduct a criminal case against defendants and that her suit would be tried in Digne, France, 850 miles south of Paris, in a location she finds inaccessible and inhospitable to foreigners (Aff. of V. Gschwind of Mar. 14, 1996, ¶¶ 2 & 3). Therefore, the court finds that France would provide an alternate forum.

B. CHOICE-OF-LAW

The second threshold question is whether French law applies to this cause of action. Ohio's law on choice-of-law governs this determination. *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S. Ct. 805, 821, 11 L. Ed. 2d 945 (1964); *Hall v. Merck, Sharp & Dohme*, 774 F. Supp. 601, 602 (D. Kan. 1991). The court has reviewed the seminal case of *Morgan v. Biro Manufacturing Company*, 474 N.E.2d 286 (Ohio 1984), which established the modern choice-of-law analysis for Ohio courts, as well as those subsequent Ohio cases applying *Morgan*, including *Nationwide Mutual Insurance Company v. Black*, 656 N.E.2d 1352 (Ohio Ct. App. 1995), *Duvall v. TRW, Inc.*, 578 N.E.2d 556 (Ohio Ct. App. 1991), *Nationwide Insurance Company v. Fryer*, 577 N.E.2d 746 (Ohio Ct. App. 1990), and *Auto-owners Insurance Company v. McMahon*, 548 N.E.2d 275 (Ohio Ct. App. 1988).

The *Morgan* court adopted the choice-of-law analysis of the Restatement of the Law of Conflicts (Second). 474 N.E.2d at 288-89. The court then explained the operation of the Restatement in the tort context:

> When confronted with a choice-of-law issue in a tort action under the Restatement of the Law of Conflicts view, analysis must begin with Section 146. Pursuant to this section, a presumption is created that the law of the place of injury controls unless another jurisdiction has a

> more significant relationship to the lawsuit. To determine the state with the most significant relationship, a court must then proceed to consider the general principles set forth in Section 145. The factors within this section are: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; (4) the place where the relationship between the parties, if any, is located; and (5) any factors under Section 6 which the court may deem relevant to the litigation. All of these factors are to be evaluated according to their relative importance in the case.

Id. at 289 (footnotes omitted). Later cases have not altered this framework.

1. **Place of Injury**

In this case, the place of injury was France. Thus, the court begins with the presumption that French law governs.

2. **Situs of Tortious Conduct**

Because this is a products liability case, the place where the defective product was designed, manufactured, or assembled is the site of the tortious conduct. The design and production of the aircraft's engine occurred in Quebec, Canada. The design and production of the plane's propeller occurred in Vandalia, Ohio or Wichita, Kansas. The design and production of the remainder of the aircraft, as well as final assembly, occurred in Wichita, Kansas. This factor weighs in favor of the forum in which the defective part was designed, manufactured, or assembled. Because it is unclear which part was defective and whether the defect was in design, manufacture, or assembly, this factor may favor the application of Quebec, Ohio, or Kansas law.

3. **Domicile, Residence, Nationality, Place of Incorporation, and Place of Business of the Parties**

Decedent was a French citizen residing in Belgium. Gschwind is a citizen and resident of Belgium. Cessna is a Kansas corporation with its principal place of business in Wichita, Kansas, but also doing business in Ohio and France.

Pratt & Whitney is a corporation incorporated under the laws of Quebec, Canada with its principal place of business in Longueuil, Quebec. Considered independently, this factor is inconclusive. Together with the next consideration, however, as will be seen, this factor weighs in favor of the application of French law.

4. **Location of Relationship Between the Parties**

Although decedent was not an employee of Cessna, he was the European distributor of Cessna's Caravan product line and conducted business in France. The Restatement notes that "[t]he local law of the state where the personal injury occurred is most likely to be applied when the injured person has a settled relationship to that state." Restatement (Second) of the Law of Conflicts § 146 cmt. e, para. 2 (1971). Because decedent was a French citizen, regularly conducted business in France, and was ostensibly operating the aircraft for business purposes at the time of the crash in France, this factor weighs strongly in favor of the application of French law.

5. **Section 6 Factors Relevant to the Litigation**

If relevant, the court may consider (a) the needs of the interstate and international legal systems, (b) the relevant policies of the fora, (c) the relevant policies of other interested jurisdictions and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied. Restatement (Second) of the Law of Conflicts §§ 6 & 145. The court finds items (b), (c), and (g) to be relevant.

a. *Relevant Policies of the Two Jurisdictions*

"In general, it is fitting that the [jurisdiction] whose interests are most deeply affected should have its local law applied." Restatement (Second) of the Law of Conflicts § 6 cmt. f, para. 1 (1971). The purpose of products liability tort law in the United States is to compensate the victim. *Cerretti v. Flint Hills Rural Elec. Coop.*, 251 Kan. 347, 360, 837 P.2d 330, 341 (1992) ("The purpose of awarding damages is to

make a party whole"); *West v. Shattuck*, No. 86-02-003, 1986 WL 13435, at *1 (Ohio Ct. App. Dec. 1, 1986) ("In a tort action, the purpose behind an award of damages is to compensate the injured party for the loss sustained"); *Motorists Mutual Ins, Co. v. ADT Security Sys.*, Nos. 14799 & 14803, 1995 WL 461316, at *9 (Ohio Ct. App. Aug. 4, 1995) ("the purpose of a products liability claim for defective design is to compensate the claimant"); Restatement (Second) of the Law of Torts § 549 cmt. g. (1977) ("the purpose of a tort action is to compensate for loss sustained and to restore the plaintiff to his former position"); Dan D. Dobbs, Torts and Compensation § 1, para. 9 (1985) ("[Tort law's] purposes are compensatory"); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 4, para. 2 (5th ed. 1984) ("primary function [of tort law is] . . . determining when compensation is to be required"); 74 Am. Jur. 2d *Torts* § 7 (1974) ("The general rule is that a person injured by the commission of a tort is entitled to actual pecuniary compensation for the injury sustained, and except where the circumstances are such as to warrant the allowance of exemplary damages, he is limited to such compensation") .

Although the parties have not supplied the court with any indication of whether or how the substantive tort law of France differs from the substantive tort law of Ohio or Kansas, there is no reason to think it serves a different purpose. Indeed, according to Martindale-Hubbell, the "[b]asic principle [of tort law in France] is that any person by whose fault ('faute') damage is caused to another is obligated to repair damage. . . . Person liable for damages must fully compensate injured party . . . ." Martindale-Hubbell, *France Law Digest in* Martindale-Hubbell International Law Digest FRA-31 (Coudert Brothers and Coudert Frères eds., 1995). "[W]hen the tort rule is designed primarily to compensate the victim for his injuries, the [jurisdiction] where the injury occurred . . . may have the greater interest in the matter." Restatement (Second) of the Law of Conflicts § 145 cmt. c, para. 1 (1971). This appears especially appropriate here because the decedent was a French citizen.

In addition to its compensatory purpose, tort law also serves a regulatory, public safety purpose. For Kansas, the regulatory purpose is ensuring the safety of all persons on planes designed, manufactured, or assembled within the state. For France, the regulatory interest is ensuring the safety of aircraft operating in French airspace for the protection of both aircraft occupants and people and property on the ground below. Thus, France has both a stronger compensatory interest and a stronger regulatory interest than Kansas. As a result, this factor favors application of the law of France.

b. *Ease In Determining and Applying Choice-of-Law Rules*

Applying the law of France would reinforce the presumption that the law of the place of the injury controls. Upholding the presumption eases the resolution of choice-of-law questions. Although ease of determining and applying the choice-of-law rules is a relatively weak factor, it remains a laudable goal of choice-of-law jurisprudence. Restatement (Second) of the Law of Conflicts § 6 cmt. j. Accordingly, this consideration lends some small weight to the application of French law.

6. **Conclusion**

In light of this discussion, the court finds that the local law of France will govern Gschwind's lawsuit.

C. PRIVATE INTEREST FACTORS

The two threshold questions having been affirmatively answered, the court's next task is to weigh the private interest factors relevant to the forum non conveniens analysis.

1. **Relative Ease of Access to Sources of Proof**

The airplane wreckage is portable and subject to the control of the parties and the court. As a result, its location, either at the time the suit was filed or now, is irrelevant in the absence of an allegation that further transportation will harm it. No such allegation has been made.

The parties themselves, their employees and records, are equally accessible in both France and Kansas because the parties are subject to personal jurisdiction in both locations. This

evidence encompasses virtually all of the evidence relevant to prove liability in Gschwind's products liability claim.

Most other sources of proof, especially those related to damages and to defendants' claims of suicide and contributory negligence, are more readily available in France. These would include, among others, meteorological records for the time and place of the crash, the investigating French police and aviation authorities and their records and reports, the air traffic and radar controllers, the decedent's relatives, friends, and associates, the decedent's business and banking records, the witness to the crash, and evidence of decedent's lifestyle, health, life-expectancy, earnings, and future earning capacity.

Gschwind discounts the importance of the French investigations and reports and the testimony of the various French investigators. She also claims that there are sufficient witnesses on the issues of decedent's flying abilities, character, and career prospects located here in the United States. She then ignores defendants' interest in pursuing evidence supporting a suicide theory.

Gschwind's characterization of the importance of certain evidence and the sufficiency of domestic witnesses is entirely unpersuasive. The information possessed by the various French witnesses as to the crash and the circumstances leading up to it is clearly relevant and highly probative, having been ascertained by presumably unbiased officials in the course of their official duties. Because the decedent was a Belgian resident, a French citizen, and was doing business primarily in Europe, French and European individuals will likely have the greatest knowledge of the decedent's flying capabilities and experience, state-of-mind, business history, lifestyle, life-expectancy, earnings, and future earning capacity. As a result, this private interest factor clearly favors a French forum.

2. **Ability to Compel Attendance of Unwilling Witnesses**

The location of the parties is irrelevant because they can be compelled to appear by any court having personal jurisdiction over the claim. In this case, both defendants have agreed to submit to the jurisdiction of French courts and to produce

in France any employee with discoverable information.[6] On the other hand, there are many witnesses in the U.S. and abroad who have information relevant to Gschwind's claims of product defect, to defendants' claims of suicide and negligent operation, and to proof of damages. The relative ability of French courts vis-a-vis this court to compel the attendance of these individuals for discovery and trial is a relevant consideration in the convenience analysis.

If this court retains jurisdiction, then pursuant to Federal Rule of Civil Procedure 45 the parties should be able to compel the presence of witnesses residing within the United States for purposes of discovery, and may be able to compel their attendance at trial. *See* Fed. R. Civ. P. 45. Neither party has favored this court with briefing on the power of French courts to compel unwilling French witnesses to attend civil proceedings for discovery and trial. The court's own research reveals that French courts appear to have procedures analogous to those in the United States to compel attendance of unwilling domestic witnesses. Rosemary A. Bruckner, *The Taking of Evidence In France,* 5 Transnat'l Law. 759, 762 & 768 (1992). The power of either court to compel the attendance of unwilling foreign witnesses is more limited.

As defendants point out, France and the United States have each ratified the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 ("Convention"). Belgium and Canada have not ratified the Convention and neither party has provided any authority relative to the ability of either French or U.S. courts to compel the attendance of Belgian or Canadian witnesses. Be that as it may, the Convention is of some limited usefulness to the court in assessing this factor.

Under the Convention judicial authorities of Contracting States, that is, nations who have ratified the treaty, may send a Letter of Request to the authorized government agency

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6. Defendants have not alleged that they have any ability to compel former employees to appear in France, and, of course, an existing employee may become a former employee at any time.

in other Contracting States. Convention, art. 2, 23 U.S.T. at 2558, 847 U.N.T.S. at 241. The Letter of Request describes the evidence to be obtained, including the proposed subjects of examination and a description of documents or property to be inspected. *Id.* art. 4. Although the Convention generally requires the receiving country to execute the Letter, there are two exceptions. *Id.* art. 12. The receiving country may refuse to execute the request if the discovery request falls outside of the function of the judiciary in the receiving country, or if the receiving country determines that complying with the request would prejudice its sovereignty or security. *Id.* The Convention provides no guidance on what constitutes prejudice to sovereignty or security. The parties have provided no indication that French and U.S. authorities interpret or apply this language differently.

Article 23 of the Convention authorizes Contracting States to make a declaration at the time of ratification that they will not execute Letters of Request for the purpose of obtaining pretrial discovery of documents. The United States did not make such a declaration, while France did. On January 19, 1987, however, France modified its declaration: "The declaration made by the French Republic in accordance with Article 23 relating to Letters of Request issued for the purpose of obtaining pretrial discovery of documents does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure." (Transl.) Accordingly, if the case is tried here, the scope of defendants' document discovery in France will be more restricted than provided for by Rule 26(b)(1) of the Federal Rules of Civil Procedure. If the case is tried in France, the parties will face absolutely no Article 23 restrictions.

Finally, the Convention provides that in the execution of a Letter of Request, the receiving country will apply its own law as to the methods and procedures to be followed. Convention, art. 9. It will, however, follow a special method or procedure requested in the Letter unless that method or procedure is incompatible with the internal law of the receiving state or impossible to perform by reason of its internal practice and

procedure or by reason of practical difficulties. *Id.* In French civil litigation there are no depositions and there is no direct or cross-examination of witnesses before or during the hearing.[7] Rosemary A. Bruckner, *The Taking of Evidence In France,* 5 Transnat'l Law. 759, 761 (1992). The court itself interrogates the witnesses, who are not placed under oath. *Id.* at 762. Moreover, all evidentiary decisions are left to the discretion of the court. *Id.* at 764. Cessna implies that French law does not allow for cross-examination and stenographic transcription of depositions (Doc. 50 at 12). This is technically true. What Cessna fails to recognize, however, is that France has authorized direct and cross-examination, under oath, and stenographically reported, upon request of these special procedures in the Letter. Thus, if the case is tried here, defendants will be able to obtain deposition testimony of French witnesses under substantially the same conditions as if the depositions were conducted in the United States. The principal risk to defendants is that France could find that partisan, American-style interrogation of members of its police force, aviation authority, and radar and air traffic control force would prejudice France's security or sovereignty. The court cannot discount that possibility.

Defendants next point to France's blocking statute as posing a significant obstacle to discovery in France (Doc. 50 at 10-12). Assuming French law is as Cessna claims,[8] its principal effect on this case appears to be that it would prevent defendants from obtaining decedent's financial records. Defendants believe that there is, in France, evidence of financial distress that would provide a motive for decedent to take his own life (Docs. 62 at 3-4 and Doc. 112 at 2). Because the blocking stat-

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7. The court's principal sources explaining French law have been a 1992 law review article, Rosemary A. Bruckner, *The Taking Evidence In France,* 5 Transnat'l Law. 759 (1992), and Cessna's brief (Doc. 50) which relies on earlier case law. The court recognizes the limitations of these sources. At any rate, Gschwind has not contradicted Cessna's exposition of French law, and the court has no primary sources of French law readily available for consultation.

8. Gschwind has not disputed Cessna's description.

ute imposes criminal penalties for requesting financial or banking records, it precludes such discovery and therefore favors a French forum.

Finally, defendants point out that U.S. courts express a preference for live testimony over deposition testimony. *Griman v. Makousky,* 76 F.3d 151, 153 (7th Cir. 1996); Fed. R. Civ. P. 32; *Martinez v. City of Stockton,* No. 92-15013, 1993 WL 478922 at *3, 12 F.3d 1107 (Table) (9th Cir. Nov. 19, 1993); 8A Charles Alan Wright and Richard L. Marcus, Federal Practice and Procedure § 2142, 2d para. (2d ed. 1994); *see Angelo v. Armstrong World Indus., Inc.,* 11 F.3d 957, 963 (10th Cir. 1993). Because the Convention gives U.S. courts no power to compel the attendance of French witnesses at trial, and because defendants have agreed to make their officers and employees available in France, the court finds additional support for a French forum.

3. **Cost of Obtaining Attendance of Willing Non-Party Witnesses**

Because most willing non-party witnesses appear to be located in the United States, this factor favors a Kansas forum.

4. **Ability to View the Premises**

Because the court finds that a view of either the crash site or the defendants' design, manufacturing, and assembly sites would be unhelpful and inappropriate, this factor is inapplicable to the analysis. This is not to say that photographs or descriptions of the crash site are irrelevant or inadmissible.

5. **Other Practical Problems Making Trial Easy, Expeditious and Inexpensive**

The language barrier involved with witnesses and documentation is generally a neutral consideration. If the trial is held here, translators or translations will be needed for French language testimony and documents. If the case is litigated in France, translators or translations will be needed for English language testimony and documents.

More relevant is this court's complete lack of familiarity with French law, and the total absence of French legal resources in the assorted libraries of the District of Kansas. In

order to overcome these obstacles the parties will have to present the court with their competing views of French law. One or more experts in French law may need to be retained. Overcoming these obstacles will make this litigation much more difficult, time-consuming, and costly. These considerations speak in favor of a French forum.

6. **Conclusion**

Private interest factors 1, 2, and 5 support the prosecution of this case in a French forum. Factor 3 is to the contrary and factor 4 has no application to the case. Weighing each factor individually and collectively, the court finds that private interest considerations favor a French forum.

E. PUBLIC INTEREST FACTORS

The final step in the court's analysis is weighing the public interest factors bearing on the convenience of the forum.

1. **Administrative Difficulties of Courts With Congested Dockets Which Can Be Caused By Cases Not Being Filed At Their Origin**

Allowing the case to proceed in this court will unduly contribute to the congestion of the court's docket. There are already numerous civil motions that have been pending before this court for more than six months. The complexity involved with determining, construing, and applying French law and with arranging for foreign discovery will require exorbitant expenditures of this court's time and further congest the court's docket. This factor therefore supports dismissal so that the case may proceed in a French forum.

2. **Burden of Jury Duty on Members of a Community With No Connection to the Litigation**

Assuming that the alleged defect was caused or created in Kansas or by Cessna, both Kansas and France have a connection to this litigation. As a result, retaining jurisdiction over the case would not burden a jury that has no connection to the litigation.

3. **The Local Interest in Having Localized Controversies Decided at Home**

This is not a localized controversy because it involves, potentially, participants in Quebec or Ohio, Kansas and France. As noted previously in the choice-of-law discussion, however, the French interest in assuring compensation for the death of one of its own citizens for injuries arising from the fault of others trumps Kansas' interest in ensuring that foreigners are so compensated. France's regulatory interest is also more significant. Thus, France has a stronger interest that Kansas it having the case resolved in its courts.

4. **The Appropriateness of Having Diversity Cases Tried in a Forum Familiar With the Governing Law**

Without repetition, the court incorporates the discussion in other portions of this memorandum relevant to this consideration. In addition, the court notes that it has no knowledge of the French language generally or legal terms specifically, making the task of statutory construction exceedingly difficult. Essentially, the court will be forced to accept the interpretations of the parties or of experts in French law and will be deprived of the ability to make its own independent analysis of French law. The court finds that this factor supports dismissing this case to allow the claim to proceed in French courts.

5. **Conclusion**

Public interest factors 1, 3, and 4 support the prosecution of this case in a French forum. Factor 2 favors neither forum. Weighing each factor individually and collectively, the court finds that public interest considerations favor a French forum.

VI. CONCLUSION

The court finds that litigation in this court would pose a heavy burden on defendants and on this court. Gschwind has offered no satisfactory reason for bringing this litigation in her chosen forum, Ohio, or for continuing her litigation here. The private and public interest factors clearly favor trial in France.

Defendants' motions to dismiss for forum non conveniens (Docs. 7 and 46) shall be granted provided that within thirty days each defendant files with the clerk of this court a signed affidavit executed by a representative of each defendant binding the defendants to the following obligations:

1. To produce their respective employees, officers, and records in France, at their own final cost, under the same terms and conditions as would be required if the employees, officers, and records were located in France;

2. To make good faith and reasonable efforts to obtain the attendance of former employees and officers whenever the production of such individuals would have been appropriate under the preceding paragraph had those individuals been current employees and officers of defendants, to include offering to pay at the respective defendants' final cost the witnesses' reasonable expenses for travel and accomodations;

3. To waive any limitations defenses that would not have been available to them had Gschwind initiated her litigation in France on the day she filed her initial complaint in the Court of Common Pleas of Montgomery County, Ohio;

4. To transport, at their own final cost, all physical evidence brought from Europe back to France;

5. To promptly and voluntarily enter their appearance before the court when Gschwind initiates this litigation in France; and,

6. To consent to reinstatement of this case in its present posture before this court, without prejudice to Gschwind, in the event French courts refuse to accept jurisdiction over the matter.

The affidavits shall further state that all outstanding fees and expenses of Carla Potok have been paid.

Accordingly, defendants' motions to dismiss on the ground of forum non conveniens (Docs. 7 and 46) and their objections to Magistrate Merz' pertinent recommendation (Docs. 79 and 80) shall be granted and sustained as soon

as defendants' have filed the appropriate affidavits. If defendants fail to do so within thirty days, their motions and objections shall be denied.

Should either party file a motion for reconsideration, it must comply with Rule 7.3 of this court. The motion and any response may not exceed three pages in length, including supporting arguments and authorities. No reply may be filed.

IT IS SO ORDERED.

Dated this ____ day of March, 1997, at Wichita, Kansas.

Monti L. Belot
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION AT DAYTON

VIRGINIE GSCHWIND, et al.,	
Plaintiff(s),	Case No. C-3-95-364
v.	District Judge Sandra S. Beckwith Magistrate Judge Michael R. Merz
THE CESSNA AIRCRAFT COMPANY, et al.	
Defendant(s).	

REPORT AND RECOMMENDATIONS;
DECISION AND ORDER

This case is before the Court upon the following motions and filing:

1. Motion of Defendant Cessna Aircraft to Dismiss on *forum non conveniens* grounds or to transfer venue to the United States District Court for the District of Kansas (Doc. #7);

2. Motion of Defendant Pratt & Whitney to Dismiss for lack of personal jurisdiction and for *forum non conveniens* (Doc. #46);

3. Defendant Hartzell Propeller's Motion for Summary Judgment (Doc. #49);

4. Plaintiff's Motion to Stay Ruling on the Hartzell Summary Judgment Motion (Doc. #57);

5. Pratt & Whitney's Motion to Strike the Affidavit of Plaintiffs co-counsel, Mr. Wolk (Doc. #63); and

6. Consent to Jurisdiction by Carla Potok.

THIS CASE SHOULD NOT BE DISMISSED ON *FORUM NON CONVENIENS* GROUNDS

Both Cessna and Pratt & Whitney seeks dismissal on *forum non conveniens* grounds. They point out that the Plaintiff is a Belgian citizen, but her decedent was French, the crash and subsequent investigation occurred in France, the wreckage of the aircraft is in France,[1] and many of the investigating witnesses are in France or elsewhere in the European Community. On the other hand, few if any of the relevant witnesses are in Ohio, although many more are in the United States in other States.

The standards for dismissing an action on grounds of *forum non conveniens* are established by the Supreme Court's decisions in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981), as followed by the Sixth Circuit in *Stewart v. Dow Chemical Co.,* 865 F. 2d 103 (1989). To prevail on a motion to dismiss on *forum non conveniens* grounds, a defendant must show that there is an available alternative forum. Then the trial court must weigh the relative convenience of the forum chosen by the plaintiff as compared to the available alternative both in terms of the private interests of the litigants and the public interests involved. Relevant private interests are relative ease of access to sources of proof, the availability of compulsory process to obtain the attendance of unwilling witnesses, the possibility of a view of the scene if relevant, "and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Stewart,* 865 F. 2d at 106, quoting *Gulf Oil Corp.* Relevant public interest factors are the administrative difficulties of courts with congested dockets; the burden of jury duty on citizens of a community having no connection with the litigation; the desirability of holding a trial near those

1. Now in the custody of Carla Potok who has consented in writing to this Court's exercise of jurisdiction over her for purposes of performing that function. The Magistrate Judge's Order appointing her as custodian has been objected to by Plaintiff, but is effective unless stayed and/or reversed by Judge Beckwith.

most affected by it; and the appropriateness of holding a trial in a diversity case in a court which is familiar with the controlling law. *Id.* While in many cases the plaintiff's choice of forum is entitled to substantial weight, that is less so when the plaintiff has chosen a foreign forum. *Piper.*

It is not clear that Defendants have satisfied the first prong of the *Gilbert* requirements by proving that there is an available alternative forum, for they have given the Court little explanation of the French legal system as it bears affirmatively on France as a choice of forum. Presumably France has a court of general jurisdiction which would consider the claims of a French national's estate in product liability, but that has not been shown, nor have the Defendants given this Court much information about the procedure in such a court. In *Stewart,* in contrast, the American manufacturer desiring that the case be dismissed to be refiled in Canada stipulated to allow plaintiffs many of the advantages they would have had in litigating in an American forum. No such offer is made here. Indeed, Cessna is content to rely on case authority holding that alternative fora are not legally inadequate because they may be more or less favorable to one or the other party. Accepting that proposition, a foreign forum which is not shown to be able to exercise jurisdiction of the controversy is not adequately shown to be an available alternative forum, and it has not been demonstrated that the French courts could or would attempt to exercise jurisdiction over Cessna or Pratt & Whitney. The burden of showing an available alternative forum is on the moving defendants. On that ground alone, the *forum non conveniens* motions should be denied.

If we assume for the sake of argument that the French[2] courts are an available alternative forum, we must weigh both the private litigants' interests and the public interest in the competing fora. The parties offer lists of large numbers of hypothetical witnesses on at least two continents and many

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2. Cessna also mentions the Belgian courts but makes no more showing of their availability than is made as to the French courts. There would be far less convenience in trying the matter in Belgium than in either the United States or France since none of the witnesses except the Plaintiff are in Belgium, and her testimony would only be to limited issues in the case.

different countries. The bulk of the likely material witnesses are either in France or in the United States. Cessna argues that the French government is very protective of French citizens from whom foreign discovery is sought, and that argument is unrefuted. It would count in favor of a French forum if it were shown that French process to compel foreign witnesses were more effective, but that has not been shown. Furthermore, any French unwillingess to permit discovery from French nationals may cut as harshly against the Plaintiff as it does against Defendants. On balance, at least upon the evidence presented here, sources of proof are as likely to be accessible to an American court as to a French court, especially now that the wreckage is in the custody of a custodian answerable to the American courts.

No view of the scene of the accident is likely to be material to the decision in this case.

Other practical considerations regarding trial are inconclusive. Clearly, there will need to be a great deal of travel by witnesses and/or counsel to ready this case for trial and the actual trial will probably have to have a large amount of the testimony presented by deposition, regardless of whether it is in France or the United States. Much testimony will probably need to be translated either into French or into English/American.

The public interest factors are also inconclusive. It appears that under Ohio choice of law doctrine[3], French substantive law will govern the trial, a point which argues in favor of a French forum. However, this Court is completely unadvised as to the relative states of congestion of American federal district court dockets and the trial dockets of the relevant French courts. Presumably a French factfinder would be interested in deciding the claims of a French national's estate, but an Ohio jury would be interested in deciding whether an Ohio-made propeller was defective and a Kansas jury would similarly be interested in deciding whether there were any defects in a Kansas-manufactured aircraft. Thus it is appropriate to impose the factfinding burden on either a French or an

3. *Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d 339, 474 N.E. 2d 286 (1984).

American factfinder. As to the desirability of deciding the case in a locality most affected by it, that factor is also inconclusive, as all suggested venues are equally likely to be affected in the sense intended by the *Gilbert* court.

Since neither Cessna nor Pratt & Whitney has proved that the balance of convenience favors a French or Belgian forum, their motions to dismiss on *forum non conveniens* grounds should be DENIED.

THIS CASE IS ORDERED TRANSFERRED TO KANSAS

As an alternative to dismissal, Cessna moves for transfer of this case to the United States District Court for the District of Kansas. The relevant statute is 28 U.S.C. § 1404(a) which provides:

> (a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Under 28 U.S.C. § 1391, this action might have been brought in the District of Kansas[4] since a substantial part of the events giving rise to the claim — manufacture/assembly of the allegedly defective aircraft — occurred in that district. As indicated above in the recommendation not to dismiss on *forum non conveniens* grounds, few witnesses are in Ohio, far more sources of proof, both live and documentary, are in Kansas.

Although Plaintiff's present trial attorney is in Ohio, that is a mere artifact of this Court's local rules: Mr. Wolk appears to be lead counsel and sought at one point to substitute for Mr. Dennis as trial attorney; of course, Mr. Wolk would have to travel to litigate this case in either Ohio or Kansas, since he resides in Pennsylvania.

Although venue is proper in Kansas, the Court cannot determine whether the District Court in Kansas can exercise personal jurisdiction over Pratt & Whitney, the engine manufacturer. However, Pratt & Whitney has raised a strong defense of lack of personal jurisdiction in Ohio on the ground

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4. Pursuant to 28 U.S.C. § 96, Kansas consists of one judicial district with no divisions but nine separate locations for holding court.

that the Plaintiff's cause of action does not arise from any business transacted here, which is required for jurisdiction under Fed. R. Civ. P. 4 and Ohio Revised Code §2301.382. That question may be completely obviated by transfer to Kansas in that perhaps Pratt & Whitney does business there or, again perhaps, Plaintiff's cause of action arises out of business transacted there by Pratt & Whitney.[5] In any event, Pratt & Whitney's motion to dismiss for lack of personal jurisdiction is not yet ripe for determination and it will be no more inconvenient for either party to litigate that question in the Kansas court.

Finally, the inclusion of Hartzell Propeller as a defendant would argue for keeping the case in Ohio. However, this Court has already found that the joinder of Hartzell is fraudulent in its decision denying remand for lack of diversity. There is simply no proof at this stage of the case that a Hartzell propeller is involved in any way.

MOTION TO STRIKE WOLK AFFIDAVIT

Pratt & Whitney's Motion to Strike Mr. Wolk's Affidavit is DENIED. Affidavits submitted in support of motions other than motions for summary judgment need not meet the stringent requirements of Fed. R. Civ. P. 56(e). Nor does counsel's affidavit on a preliminary motion require that he be disqualified as counsel since the principal reason for that rule is to prevent jury confusion. The Court can sift through the averments of the affidavit and give it what weight is appropriate, discounting where Mr. Wolk fails to show an adequate foundation.

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5. The Court suggests no opinion on how these questions would properly be decided since Pratt & Whitney has taken no position here on its amenability to suit in Kansas and the Kansas long-arm statute is also not before the Court.

HARTZELL'S MOTION FOR SUMMARY JUDGMENT AND PRATT & WHITNEY'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION ARE DEFERRED TO THE TRANSFEREE COURT

Plaintiff claims and Pratt & Whitney concedes that Plaintiff is entitled to discovery on the personal jurisdiction question (Doc, #63) which is therefore not ripe for decision. Of course, the complexion of that question will change upon transfer.

Plaintiff seeks delay of a decision on Hartzell's summary judgment motion until discovery has occurred. While Plaintiff has pointed to no likely evidence which will be discovered by further effort and the Court has held that there is no evidence tending to show that Hartzell could possibly be liable in this action, Hartzell will not be prejudiced by having another court take a fresh look at this evidence.

Accordingly, decision on Pratt & Whitney's Motion to Dismiss and Hartzell's Motion for Summary Judgment will be deferred to the transferee court. It is this Court's opinion, however, that Pratt & Whitney should not be deemed to have waived their lack of personal jurisdiction defense since proceedings in the case were stayed at Plaintiff's request while the remand question was being decided.

ORDER FOR TRANSFER

Pursuant to 28 U.S.C. §1404(a), this case is ORDERED transferred to the United States District Court for the District of Kansas. The Clerk shall transfer the case to the location of court at Wichita without prejudice to the transferee court's determination of the appropriate location of court for this litigation.

DELAY OF EFFECTIVENESS

The effectiveness of this Order is delayed to and including July 23, 1996, to preserve the rights of Cessna and Pratt & Whitney to object to the recommendation not to dismiss on *forum non conveniens* grounds and the rights of all parties to appeal to District Judge Beckwith from the nondispositive rulings herein.

July 3, 1996.

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

VIRGINIE GSCHWIND, et al., *Plaintiff(s),*	Case No. C-3-95-364
v.	District Judge Sandra S. Beckwith Magistrate Judge Michael R. Merz
THE CESSNA AIRCRAFT COMPANY, et al. *Defendant(s).*	

NOTICE OF FILING REPORT AND RECOMMENDATIONS

Attached is a Report and Recommendations of United States Magistrate Judge Michael R. Merz, filed on the above file-stamped date.

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by mail. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See, United States v. Walters,* 638 F. 2d 947 (6th Cir. 1981); *Thomas v. Arn,* 474 U.S. 140 (1985).

July 3, 1996.

Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

Due date: July 23, 1996.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

VIRGINNIE GSCHWIND, In Her Own Right and Administratrix of the Estate of Cyril Gschwind, Deceased, and as Parent and Natural Guardian of Alexandra Gschwind Metsijsdreef 37
3090 Overijse
Belgium

Plaintiff,

vs.

THE CESSNA AIRCRAFT COMPANY
3535 McCauley Place
Vandalia, Ohio 45377

and

HARTZELL PROPELLER, INC.
One Propeller Place
Piqua, Ohio 45356

and

PRATT & WHITNEY CANADA, LTD.
1000 Marie Victorin Boulevard
Longueuil, Quebec
CANADA J4K4X9,

Defendents.

Case No. C-3-95-364

Hon.: Sandra Beckwith

DEFENDENT CESSNA AIRCRAFT COMPANY'S MOTION TO DISMISS ON THE GROUNDS OF FORUM NON CONVENIENS OR FOR CHANGE OF VENUE PURSUANT TO 28 U.S.C. 1404(a)

Cessna Aircraft Company ("CESSNA"), through its attorneys, requests that this Court dismiss this matter on the grounds of forum non conveniens or, in the alternative, change venue in this matter to Kansas, for the following reasons:

1. This accident involves a Cessna 208B which crashed in France.
2. The decedent was a French national living in Belgium with his wife, the estate's administratrix, who also is a resident of Belgium.
3. The facts related to the aircraft accident and its subsequent investigation are substantially located in France.
4. The decedent has sufficient recourse through either the French or Belgian courts for this matter.
5. The factors and law identified in the attached and incorporated brief support a finding that this matter must be dismissed on the grounds of *forum non conveniens.*
6. In the alternative, if this Court believes dismissal is not warranted, this Court should change venue in this matter to Kansas because the factors and law identified in the attached and incorporated brief support a finding that venue should be transferred to Kansas pursuant to 28 U.S.C. 1404(a).

WHEREFORE, Cessna Aircraft Company respectfully requests that this matter either be dismissed or transferred to Kansas.

Respectfully submitted,

JENKS, SURDYK & COWDRY
Co-Counsel for Defendents

Dated: September 22, 1995 By: _____

Christopher F. Johnson
206 E. First Street
Dayton, OH 45402
Telephone: (513) 222-1970

TOLLEY VANDENBOSCH
& WALTON P.C.
Co-Counsel for Defendents

Dated: September 18, 1995 By: _____

Richard J. Durden (P29114)
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5650 Foremost Drive S.E.
Grand Rapids, MI 49546-4677
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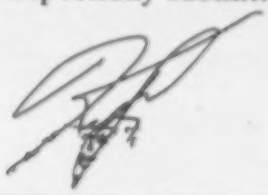
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

VIRGINIE GSCHWIND, etc., *Plaintiff,* *v.* THE CESSNA AIRCRAFT COMPANY, et al. *Defendents.*	Case No. C-3-95-364 JUDGE SANDRA S. BECKWITH MAGISTRATE JUDGE MICHAEL R. MERZ MOTION OF PRATT & WHITNEY CANADA INC. TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR, IN THE ALTERNATIVE, MOTION TO DISMISS UNDER THE DOCTRINE OF FORUM OF NON CONVENIENS

NOW COMES Pratt & Whitney Canada Inc. and hereby moves that Plaintiff's Complaint be dismissed against it pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure since this Court has no personal jurisdiction over Pratt & Whitney.

In the alternative, Pratt & Whitney moves to dismiss the case under the doctrine of *forum non conveniens.* A Brief in Support as well as an Affidavit is attached hereto and made a part hereof.

Respectfully submitted,



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APPOINTED BY THE PARIS COURT OF APPEAL

CR AU no 9621

ASSIGNATION

DEVANT LE TRIBUNAL DE COMMERCE DE CANNES

~~Le dix huit Novembre mil neuf cent quatre vingt quinze~~

COPIE

55a

A LA DEMANDE DE : La société **TITAN AIRWAYS LIMITED**, société de droit anglais, ayant son siège social au Enterprise House, Stansted Airport, Essex CM24 1 QW, Royaume-Uni, agissant poursuite et diligence de ses représentants légaux domiciliés audit siège.

Ayant pour avocat :

Me ___, Jacques BIBAS
Avocat au Barreau de ___, GRASSE
Toque ___,
demeurant ___ Résidence du Square - 112, Bd Carnot
chez qui domicile est élu. 06110 LE CANNET
Tél : 93 46 15 46 - Fax : 93 45 83 75.

Visé et reçu copie
au parquet de GRASSE
les Jour, mois et an, Susdits
Le Procureur de la République

Nous Societe Civile Professionnelle Jacques BERNARD, Pierre FEUCH, Richard SADOWSKI, Huissiers de Justice associés, Titulaire d'un office d'Huissier de Justice près le Tribunal de Grande Instance de GRASSE, à la résidence de CANNES, y demeurant, 15, square Mérimée.

L'Un d'eux soussigné,

DONNE ASSIGNATION A :

1/ **Aviation et Services Europe**, société à responsabilité limitée dont le siège social est situé Immeuble Sun 7, RN 7, Zone La Canardière, 06210 Mandelieu et immatriculée au Registre du Commerce et des Sociétés de Cannes sous le numéro B 380 119 149, PAR ACTE SÉPARÉ

Prise en la personne de son représentant légal;

2/ **Tropical Aviation Distributors Inc.**, société de droit américain, dont le principal lieu d'établissement est situé 1760 N.W. 94ème Avenue, Miami, Floride 33172, Etats Unis d'Amérique,

Prise en la personne de son représentant légal;

3/ **Cessna Aircraft Company**, société de droit américain, dont le principal lieu d'établissement est situé P.O. Box 7704, Wichita, Kansas 67277, Etats Unis d'Amérique,

Prise en la personne de son représentant légal;

4/ **Cessna Finance Corporation**, société de droit américain, dont le principal lieu d'établissement est situé P.O. Box 308, Wichita, Kansas 67201, Etats-Unis d'Amérique,

Prise en la personne de son représentant légal;

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EXHIBIT

BEST AVAILABLE COPY

OFFICIAL TRANSLATOR
P. BOMPIEDO
30 bis, rue [illegible] 75116 PARIS
Tel. 45.[illegible].03
APPOINTED BY THE PARIS COURT OF APPEAL

5/ Bob Crowe Aircraft Sales Ltd, société de droit anglais, dont le siège social est situé Cranfield Airport Bedford MK 43 OAL, Royaume Uni,

Prise en la personne de son représentant légal.

A COMPARAITRE, devant le Tribunal de Commerce de Cannes tenant ses audiences au Palais de Justice de ladite ville, sis 19 Bd Carnot, 06400 Cannes, le JEUDI 17 MARS 1994 A 14 H 30.

56a

Il est rappelé au destinataire, conformément aux articles 56 et 853 du Code de Procédure Civile:

Que les parties se défendent elles-mêmes ou qu'elles ont la faculté de se faire assister ou représenter par toute personne de leur choix: que leur représentant, s'il n'est pas Avocat, doit justifier d'un pouvoir spécial;

Qu'à défaut de comparaître ou de se faire représenter, elles s'exposent à ce qu'un jugement soit rendu à leur encontre sur les seuls éléments fournis par leur adversaire.

AVIATION & SERVICES EUROPE

Cessna

Caravan Distributor for Europe

TELEFAX MESSAGE

to	: —	fax number	: 45971484940
attn	: P. BENNEDSEN	date	: 16-08-93
from	: Cyril GSCHWIND	reference	: CG/fa/ 001
subject	: —	pages	: 1 including cover sheet

DEAR PETER,

I AM OBLIGED TO MAKE A FLIGHT TODAY WITH WHICH I DON'T FEEL CONFORTABLE AT ALL.

SHOULD ANYTHING HAPPEN TO ME, AND SINCE YOU ARE THE ONLY PERSON I TRUST, COULD YOU PLEASE.

① WIRE BACK THE EXTRA MONEY YOU RECEIVE FROM ME AT: SOCIETE DE BANQUE SUISSE
BANQUE REFERENCE : SBCOCHGGA
ACCOUNT NUMBER : 599450 W
CONTACT NUMBER : 41223766732

② TAKE CARE AS BEST AS YOU CAN, OF THE INTERESTS OF MY SMALL FAMILY (WIFE + BABY)

THANK YOU

Cc.

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STATUTE INVOLVED

28 U.S.C. § 1332(a) provides in pertinent part as follows:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.